

The Rights and Duties of Spouses

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*"So take what the Apostle assigns to you,
and deny yourselves that which he
withholds from you".*

[Al-Hashr: 7]

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FOREWORD

Two things are essential for the survival of a society, viz., a comprehensive law framed to suit the peculiar needs of its cultural pattern and, secondly, the leadership that can enforce this law exactly in the spirit in which the law was framed. It is a pity that the Indian Muslims currently lack both these things. True, they possess laws preserved in the books, a legal code, which fully suits Islamic civilization and culture and encompasses all social and cultural aspects. But in practice this legal code stands abrogated. Instead, their social affairs are being governed by a code of law that is totally un-Islamic, in most of its social and cultural aspects. And to the extent to which it is Islamic, it falls short of the Islamic objectives. The government, under which the Muslims are living today, has practically divided their lives into two sections. In one section, it has subjected the Muslims, along with other communities of India, to the laws that have no compatibility with Islamic culture. And in the second section, the Muslims' right for the enforcement of Islamic law has, in principle, been conceded. But, in practice, even in this section the Islamic *Shari'ah* has not been rightly enforced. The so-called Muhammadan Law enforced in this part is very different, both in letter and spirit, from the genuine Islamic *Shari'ah*. The enforcement of this law can in no way amount to the enforcement of the Islamic *Shari'ah*.

This regrettable state of affairs has done great harm to the cultural life of the Muslims. The greatest harm done by it is the destruction of our family life. The lives of a large part of our population have been embittered and devastated. The marital relationship of man and woman is, in fact, the cornerstone of human culture. No human being, whether a man or woman, can step outside the ambit of the law designed to regulate the marital relationship. From childhood to old age, at every stage of life, this law influences human life. The rearing of a child is sure to bear the impress of the relationship of his parents. When he grows up to be a man, he will have to share life with a wife. When he reaches old age, his offsprings will have to be tied down by marital relationships and his own peace of mind will be largely determined by the happy relationship between his son and his daughter-in-law as well as between his daughter and his son-in-law. In short, the marital law is the most important and the most far-reaching of all social laws. Because of its basic importance, Islam formulated this law on extremely sound principles. In matters of marital relations the Muslims were given a clear, comprehensive and perfect law that can, in every respect, be called the best marital law of the world. But unfortunately, this was overtaken by the so-called Muhammadan Law and was so badly deformed that it came to bear a very faint resemblance with the real Islamic marital law. Currently, the marital affairs of Muslims are governed by the so-called Islamic *Shari'ah* which is neither clean, nor comprehensive nor perfect. Its defects have influenced the cultural life of the Muslims perhaps more adversely than any other law. There is hardly a fortunate family in India which is governed by this law,

and life of someone of that family has not been ruined by this particular law. But the devastation of a life is a relatively minor thing. The great calamity is that this law has played havoc with the honour and good name of most of the Muslims. It has ruined their morals and their faith. It has let loose a flood of indecencies and apostasy into Muslim families that were considered to be the safest citadels of Islam and its culture.

The damages resulting from the shortcomings of this law and the failures of the executive authority multiplied on account of two reasons:

First, the lack of religious education. This has led to a sort of alienation of Muslims from the Muslim marital law that even well-educated Muslims are not aware of the common issues involved in this law.¹

The second cause is the influence of non-Muslim cultures. Due to this influence several customs and superstitious rites and rituals that are alien to the Muslim marital law and its spirit, have found their way into the marital relations of Muslims. Consequently, the true Islamic concept of marital relationship has escaped the minds of a great majority. In many cases the Hindu concept prevails, reducing the wife to the status of a slave-girl and elevating the husband to the status of a deity or a god. The marriage tie is unbreakable in practice, if not in principle. Divorce by the husband or by the wife is looked down upon as a stigma, which is avoided even if it becomes imperative, just to save face, though this may involve covert acts far worse than divorce. To forestall a divorce, the dower has been raised to such heights that deters the husband

from thinking of a divorce. If mutual hatred happens to develop, the man feels compelled to leave the woman in the lurch. Husband worship has come to be regarded as a source of pride and moral duty for the woman. Fear of social disapproval keeps her from dropping a hint of divorce even in the most trying circumstances. Even in the event of the husband's death it is considered to be her moral duty to live for the rest of her life, like Hindu woman, in the name of her husband. The remarriage of a widow is considered to be shameful, not only for her, but also for her family. The people of new generation, on the other hand, who are under the spell of Western culture, go on quoting to suit their whims the Quranic verse "Women deserve the same kind of treatment as men deserve from them." But if you quote the Quranic verse "Men are a degree above women", their voices suddenly get hushed. And when they come to the verse "Men are more powerful than women" they start hiding their helplessness to delete this verse from the Quran. They come out with all kinds of preposterous explanations of the verse. And their mode of explanation exposes their shame that their Holy Book should contain such a verse. The reason for this is that the equality of sexes publicized by Western culture has captivated their minds. They have lost the ability to comprehend the solid and infallible rational grounds on which Islam has based its social structure.

These different reasons have combined to drag the family life of Muslims to depths that sadly contrast its former heights. The current laws and the executive machinery enforcing these laws are simply incapable of ironing out the complexities in the marital affairs of

the Muslims, resulting from ignorance and the influence of foreign cultures. If anything, the complexities have increased. Because of ignorance a section of Muslims believes that these evils have stemmed from deficiencies in the Islamic law. That is why they call for the compilation of a new code of law. The truth is that Islam possesses a perfect marital law that specifies clearly and equitably the rights of both husband and wife. Full provision has also been made for the protection, and in case of transgression (whether by husband or wife) for the restitution of these rights. There is no problem that has not been equitably solved. So Muslims are not in need of any law. All they need is that the Muslim marital law should be enunciated in its true form and efforts be made to enforce it in the proper manner. This is by no means an easy task. To begin with, it is the duty of the Ulama to give up blindly following in the footprints of the past. They need to take into consideration the present-day circumstances and needs, and in this context, to compile the Muslim marital law in a way that fully solves the current complexities of the marital problems facing the Muslims. Muslims in general should also be educated in this law, so that they can rid their social life of the unhealthy customs and concepts that have been borrowed from non-Muslim cultures. Only then they will understand the basis and the spirit of the Islamic law and will deal with their affairs accordingly. In addition to this, there must be a judicial system that has faith in this law; its judiciary should have undergone the academic and moral training that enables it to enforce this law in its true spirit, and not in the erroneous concepts of alien laws.

This treatise has been written to meet this very need. In the following pages we plan to set forth a full sketch of the Islamic marital law. The objectives of the law, its principles and its mandates, will all be discussed in due course. For explanation, we will quote, where necessary, the precedents handed down by the Holy Prophet (peace be upon him) and his companions, as well as the opinions of the great scholars of our early history. That will make the explanation of related issues easy. In the end, some proposals will be made that will help solve, to some extent, the difficulties faced by Muslims in their marital affairs. In fact, the right and effective remedy for these difficulties lies in the establishment of an Islamic state and an Islamic judiciary. But as the barest minimum, we want to discuss even the skeletal forms which can, in a correct Islamic way, remove the evils plaguing the marital affairs of the Muslims. That will enable people, who are striving to solve these problems, to avoid moving in the wrong direction and to adopt a way that is compatible with the *Shari'ah*.

References

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1. It is, for example, the result of ignorance that Muslims in general know only one mode of pronouncing divorce, i.e., pronouncing the three divorces all at once. Even the person who writes down the divorce deed pens down three simultaneous divorces. Islam looks upon this as a deviation and a serious sin. This leads to a host of legal complexities. If people realize that a single pronouncement of divorce serves the same purpose as three pronouncements at a time, the possibility of reconciliation before the expiry of the prescribed time remains and there remains the option of reunion after the expiry of the prescribed time. That could save many homes from breaking up and could also save countless people from indulging in falsehood, trickery and violation of law.

OBJECTIVES OF THE MARITAL LAW

Before going into the details of the marital law, it is necessary to understand its objectives. The objectives of a law are its core. In order to achieve the objectives principles are prescribed and then mandates are formulated to serve the principles. If mandates are given without comprehending the objectives, there is a possibility of the mandate being applied to a particular issue in a way that forfeits the very essence of the law. In the same way, a person, who is unaware of the objectives of a law, will not be able to follow it in the true spirit of the law. So, we begin with the explanation of the objectives for which Islam has laid down its marital law.

PRESERVATION OF MORALITY AND CHASTITY

The first objective of the Islamic marital law is the preservation of morality. Islam denounces fornication as illegal. It urges both sexes of humanity to subject their relationship to a code of law which protects the morality of man against indecency and immodesty and guards civilization against chaos. That is why the marriage tie has been termed "fortification" by the Quran; "Hisn" means fort in Arabic and "Ihsan" means fortification. A person who marries gets fortified. In other

words he builds a fort for himself. The woman he marries is called "the fortified one". Marriage provides her with a fort built for the satisfaction of her sexual desires and the protection of her morality and chastity. This simile clearly shows that in Islam the first objective of marriage is the preservation of morals and chastity. The first step of the marital law is to strengthen the fort built by marriage for the preservation of a priceless possession. Note the laws of the Quran:

"(Excepting the women made unlawful for you), all other women are lawful for you, provided you seek them, with your property, in marriage, not for committing fornication". (4: 24).

"Marry them with the permission of their guardians and give them their dowrs justly, so they become chaste women, not fornicating, nor secretly receiving paramours." (4: 25).

"And so are the believing chaste women (lawful for you)-as well as the chaste women from among those who have been given the Book before you, when you give them their dowrs, taking them in marriage nor fornicating, nor taking them as paramours in secret." (5: 5).

A critical look at the above verses makes it clear that from the Islamic point of view, the most important thing about the marital relationship is the fullest and most effective preservation of morality and chastity. This objective should be achieved even at the cost of any other objective. No other purpose should be served at its cost. Husband and wife are tied together

simply with the sole aim of enabling them to satisfy their natural passions within the limits set by Allah, the Almighty. However, if the marriage tie leads to circumstances where the violation of the limits set by Allah is feared it is far better to stick to these limits at the cost of the marriage tie, rather than retain it at the cost of Allah's limits. That is why those who declare an intention to abstain from their wives have been commanded not to do so for more than four months. In case they overstep this limit, they lose their right to retain the marriage tie. If they were allowed to keep their wives suspended indefinitely, the inevitable outcome would be that the demands of their inborn passions might force the women to violate Allah's limit. That is something totally unacceptable to the Divine Law. In a like manner, men who marry more than one wife, are warned by the Quran: "Do not lean exclusively to one wife, leaving the other one in the lurch." This command also warns men not to drive women into a desperate situation which forces them to violate Allah's limits. In such a situation it is better to dissolve the apparent bond of marriage rather than retain it, and the women should get the freedom to marry someone else. The woman has been granted the right to demand divorce only to cope with such situations. Forcing a woman to live with a man with whom she is no longer happy or who cannot give her peace of mind, places her in a situation that threatens to override Allah's limits. It is because of this that a woman has been granted the right to get rid of the marriage tie, on payment to her husband the dower she received or even something more or less, as the two of them may agree upon. A detailed discussion of these clauses of the Islamic law will be taken up later. The matter

has been touched upon here just to stress the supreme importance of morality and chastity in the eyes of the Islamic law. This law does its best to strengthen the marriage tie in all possible ways, but when the retention of this bond becomes a threat to morality and chastity, Islam considers it necessary to save these precious values even at the cost of the marriage bond. This point needs to be fully grasped if the forthcoming clauses of the Islamic law are to be understood and enforced in the spirit of the *Shari'ah*.

LOVE AND COMPASSION

The second objective is to base the marital relationship between the two sexes on love and compassion, so that the two of them together can promote the tasks that human civilization and culture seek to accomplish through marriage. Love and compassion not only enable the spouses to lead a happy and peaceful family life, but also give them the strength needed for the promotion of higher cultural values. The Quran has described this objective in a tone that suggests that in the eyes of Islam the very concept of marriage is the concept of love and compassion. The spouses have been created that they may enjoy peace in each other's company:

"And of His signs is that He created mates for you from yourselves that you might find peace of mind in them and He put between you love and compassion. Surely there are signs in this for a people who reflect."
(30: 21)

In an other chapter the Quran says:

"He it is Who created you from a single soul, and of the same kind He made his mate that he might find comfort in her." (7: 189)

Still in another chapter the marital tie has been described thus:

"They are an apparel for you and you are an apparel for them." (2: 187)

The last verse compares the spouses to an apparel for each other. Dress is closer to the human body than anything else. It not only covers the human body for modesty but also protects against inclement weather. The simile of an apparel has been used to emphasise that in essence the marriage tie is just like the relationship between the human body and the dress it wears. The minds and souls of the spouses have to be so close a person that they provide a cover for each other. They should fight off all evil forces that pose a threat to the honour and morals of the mate. Such are the implications of love and compassion. This is the real meaning of the marital relationship. And if this is missing, the marriage tie is like a lifeless corpse.

This objective permeates all laws framed by Islam about marital relationship. The spouses have to live together amicably and in an atmosphere of love and harmony. They should generously respect each other's rights. In case they are unable to do this, their separation is better than their union. A marital bond which is devoid of love and compassion is like a dead body, which, if left unburied, is sure to putrefy and pollute its surroundings. This explains the Quranic verdict:

"And if you live in amity and are mindful of your duty, surely Allah is Ever-Forgiving, Merciful. And if they separate Allah will render both of them free from want, out of His ample resources." (4: 129, 130)

The point is stressed even more forcefully in other chapters:

"Then keep them in good fellowship or release them with kindness". (2: 229)

"Retain them with kindness or release them with kindness." (65: 2)

"And treat them kindly". (4: 19)

"Retain them in kindness or release them in kindness, and do not retain them just to torment them and to rob them of their rights. And whoso does this, he surely wrongs his own soul." (2: 231)

"And in your mutual dealings, do not forget to be generous". (2: 237)

Islam does not want divorce to be a hasty and impulsive act. Hence the provision for three pronouncements of divorce. Before the third pronouncement, the husband has the right to retain his wife, provided he does so in good faith. The marriage tie can stay intact only if it is sustained by love and compassion. The husband is not allowed to retain his wife with a view to tormenting her and keeping her suspended. The Quran is explicit on this point.

"And their husbands have a better right to take them back if they want this in good faith." (2: 228)

MARITAL TIES WITH NON-MUSLIMS

Muslims, both men and women, are forbidden to have marital relations with non-Muslims who are not believers in the Scriptures. The simple reason is that their religion, their thinking, their civilization and culture and their way of life are so different from those of the Muslims that it is impossible for a true Muslim to develop deep love and integration with them. Even if, despite differences, the two are tied together in marriage, the relationship will be only carnal. It will not be a truly cultural and harmonious relationship. If it is not, the love and compassion are sure to do more harm than good both to Islamic culture and to the Muslim partner of the union. The Quran bears testimony to this:

"And do not marry the idolatresses until they believe, and certainly a believing maid slave is better than an idolatress, even though you like her. Nor give believing women in marriage to idolators until they believe, and certainly a believing slave is better than an idolator, even though he pleases you". (2: 221)

As for the Jews and Christians (people of the Scriptures) Islamic law allows marriage with Jewish and Christian women because Muslims share some cultural factors with them.¹

Despite this permission Islam has discouraged such marriages. Kaab bin Malik wanted to marry a woman from among the people of the Book. The Holy Prophet (peace be on him) forbade him from this. His reason was that the woman would not be able to

provide him with the required degree of love and compassion, which is the essence of the marriage tie. The well-known companion Huzaifah wanted to marry a Jewess. Omar, the second caliph, wrote to him to drop the idea. Ali and Abdullah bin Omar openly denounced marriage with Jewish and Christian women. In support of his opinion Ali quoted the Quranic verse:

"You will not find a people, who believe in Allah and the Last Day, loving those who oppose Allah and His Messenger". (58: 22).

Ali clinched his argument by asking what is the use of marriage if there is no love between husband and wife.

COMPATIBILITY

The intention of the Islamic *Shari'ah* is that the marriage tie should be established between a man and a woman who, because of their social background, are likely to develop a bond of love and compassion. Where this likelihood does not exist, it is not desirable to arrange a marriage. That is why the Holy Prophet (peace be upon him) declared it necessary or at least advisable that, before marrying a woman, the man should take a look at her:

When someone from among you seeks the hand of a woman in marriage, he should, as far as possible, take a look at her, so that he can be sure that she has attraction for him. (Abu Dawood)

This accounts for *Shari'ah's* insistence on compatibility. It does not approve of marriage between incompatible partners. If a man and a woman belong to families that share close or partial similarities in their views on morality, religion, social behaviour and the day-to-day household management, they are more likely to develop and strengthen a bond of love and compassion. Their marriage tie can be expected to bring the two families still closer. On the other hand if the man and the woman come from families that have little in common, the greater likelihood is that, both in their domestic life and in their emotional response, the couple feels love for each other, there is little hope of their families getting any closer. This is the essence of the compatibility clause in the Islamic law.

All that has been said so far proves that after the preservation of morality and chastity, the next most important thing in the Islamic marital law is the bond of love and compassion between the husband and wife. As long as there is hope that their relations will continue to be governed by this bond, the Islamic law strives its most to protect the marriage tie. However, when love and compassion have been replaced by apathy, frustration, hatred and disgust, the law prefers to do away with the marriage tie. This point is worth keeping in mind. People who lose sight of this pertinent point and seek to apply the principles of the Islamic law to a particular case commit blunders at each step that are incompatible with the real objectives of the law.

References

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1. Muslim women are not allowed to marry men from among the people of the Scripture. Feminine nature being softer and more supple, a Muslim lady with a non-Muslim husband, in a non-Muslim society, is more likely to adopt their way of life and less likely to influence their thinking. If she refuses to be influenced by the surrounding culture, the marriage tie is sure to be reduced to a carnal relationship. She will be unable to develop love and compassion for her husband, nor can she build any useful cultural contact with the non-Muslim family and the non-Muslim society.

PRINCIPLES OF THE LAW

Having discussed the objectives of the law, we now take a look at the principles on which the Islamic marital law has been compiled. Unless the principles are thoroughly grasped, it is difficult to apply correctly the mandates of the law to particular cases.

THE FIRST PRINCIPLE

The first principle in the Islamic law, from which stem out many of the mandates, is that in marital life man is placed a degree above the woman. The following verse from the Quran elaborates the extent of the degree:

"Men are the maintainers of women with what Allah has made some of them to excel others and because they spend out of their wealth. So the good women are obedient (to their husbands) and guard their rights in their absence". (4: 34)

It is out of place to discuss here why man has superiority over the woman or why he has been made her maintainer (*qawwam* also means guardian, protector, manager, supervisor). This discussion does not belong to law. It belongs to sociology. Sticking to the limits of the topic under discussion, it is enough to point out that for the smooth running of the household affairs,

one of the partners has, in any case, to be the manager or the executive head. If both of them stand at an equal footing and possess equal powers, chaos is sure to result. That is what is actually happening in nations that have tried to grant practical equality to husband and wife. Islam has taken due account of human nature. It has chosen one of the partners as the manager and the other one as subordinate. For the ruling function it has chosen the one who is naturally fit for the job.

THE DUTIES OF MAN

The code of married life promulgated by Islam assigns to man the role of the head of the family. This role brings with it the following duties:

I. *Dower*: The husband has to pay the wife a dower. This is the price of the marital rights he has on her. The Quranic verse quoted above makes it clear that though man deserves, by his nature, to be the manager, in practice he is elevated to this role as a reward for the money he spends in the form of dower. Other verses also clarify this point:

"And give women their dower cheerfully." (4: 4)

"Excepting the aforesaid women, all other women are lawful for you, provided you seek them in return for your property, taking them in marriage and not for fornication. So in return for marital rights pay them their dower according to the appointed time limits". (4: 24)

"Marry these maids with the permission of their masters and pay them their dower in a proper manner." (4: 25)

"Lawful for you are the chaste women from among the believers and chaste women from among those who have been given the Book before you, after you have given them their dower". (5: 5)

It is binding upon the husband to abide by the agreement regarding the dower, concluded at the time of marriage. In case he refuses to abide by it, the woman has the right not to allow him to touch her. There is no way out for the man. The wife, however, may, of her own free will, grant him some time, or in view of his indigence, may remit a part of or the whole of the amount due to her. She may even give up her claim as a token of compassion.¹

"But if they (wives) of themselves be pleased to give you a part of the dower, take it cheerfully". (4: 4)

"And there is no blame on you about what you mutually settle after the dower agreement has been made". (4: 24)

II. Livelihood: The second duty of the husband is to bear the living expenses of the wife. Islam has clearly demarcated the sphere of work for the husband and the wife. A woman's duty is to stay at home and take care of the household chores. "Stay in your homes", is the Quranic commandment for women. The man is supposed to work for a living and provide the necessities of life for the family. This is the second

factor that elevates the husband a degree above the wife. This duty is implicit in man's guardianship status. *Qawwam* is a person who looks after and takes care of a thing and by virtue thereof has an authority over it. The Quranic verse justifies man's higher status on the ground that he spends money. The spending includes dower as well as the living expenses. If the husband fails to discharge this duty, the law will force him to do so. In case of refusal to comply with the legal requirement, even if it is because of indigence, the court will dissolve the marriage. As for the amount of living expenses, the assessment has to be based on the means of the man, not on the demand of the wife. The Quranic commandment in this regard is: "From the wealthy man according to his means and from the poor man according to his means". A man of limited means cannot be made to pay living expenses beyond his resources, nor can a man of ample means be allowed to pay an amount below his financial status.

III. *Abstention from Cruelty*: The third duty of man is not to use his superior position as a means of oppressing his wife. Oppression can take several forms, like *leaving alone*. This means depriving the wife of sex, not on grounds of health, but just to punish or torment her. The maximum time allowed by the Islamic law for such punishment is four months. Before the expiry of the four months, the husband must resume sexual relations. On the expiry of the time limit, separation must take place. The Quran says:

"Those who swear to leave their wives alone, have to wait four months. If they resume sexual relations, Allah is Forgiving, Merciful. But if they decide on a

divorce, then Allah is surely Hearing, Knowing".
(2: 226)

Some jurists are of the view that taking a vow is a necessary part of the case if it is to be covered by the above verse. If no vow is taken and the husband is just angry with the wife, the case will not fall in this category and the marriage tie will stay intact, even though the man may not touch the wife for 10 years. I do not agree with this view. My reasons are:

First, when the Quran pronounces a commandment about a particular case, it does not mean that it covers just that particular case. The point becomes amply clear when we consider the Quranic commandment making the stepdaughter unlawful for a man. The words used by the Quran are: "The foster girls who have grown up in your lap". This would seem to suggest that only those stepdaughters have been unlawful who were just babies when their mothers married their stepfather. No jurist has even taken this position. All agree that a stepdaughter is unlawful for a stepfather even though she be a grown up woman when her mother married the man. In the same manner the Quranic words, "Those who swear not to touch their wives", do not imply that the verse is applicable only to cases where an oath has been taken.

Secondly, it is almost a unanimously accepted principle of Islamic jurisprudence that when a case seems to be covered by no commandment, it should be placed in a category where a commandment exists provided the basic reasons behind this commandment are the same as the basic issues involved in the uncovered

case. Let us see why the Law-giver has prescribed a period of four months for the man who has vowed not to touch his wife and why he has been told that if he does not resume sexual relations within the prescribed time, he shall have to dissolve the marriage tie. Can anyone give a reason other than the fact that going without sex for more than four months is injurious for the woman and the Law-giver wants to save her from ill-effect? This commandment is followed, a little further, by the commandment "Do not retain them just to do them injury, for them you exceed the limits." In another verse, quoted in the previous chapter, the Law-giver commands: "Do not lean exclusively to one wife, leaving the other one suspended". These broad hints clearly indicate the Law-giver's disapproval of keeping a woman tied down by the marriage and then leave her suspended just to torment her. No other reason can be ascribed for the four-month time limit. So when a husband purposely cuts off sexual relations with his wife, even without taking a vow, why should the case not be covered by the verse which speaks of swearing by the husband? After all the injury caused to the wife is the same whether the man swears or not. Can any sensible person imagine that a husband who vows to refrain from sexual relations causes injury to the wife but no injury will be caused if he does not swear even though he may not touch her for the rest of his life.

Thirdly, the most important objective of the Islamic marital law is the preservation of morals and chastity. If a man is disgusted with one wife and marries another one and thus saves himself from evil ways and evil glances, how can a woman, who has been

permanently deprived of sex by her husband, protect her morals? Does it stand to reason that the wise Law-giver should provide for the protection of her morals if the husband is under an oath not to touch her, and if the man is not under any oath the threat of immorality should be left hovering indefinitely over the woman's head?

On the above grounds I favour the ruling of the Maliki school of thought which asserts: If the husband withholds sex with a view to injuring the wife, the case will fall under abstention because of an oath, even though the man be under no oath. That is because the intention of the Law-giver in the latter case is to prevent injury to the woman. This cause also exists in abstention with swearing.²

There is a difference of opinion about the implications of these words "If they decide on a divorce". Osman bin Affan, Zaid bin Sabit, Ibn Masood and Ibn Abbas are of the view that the expiry of the four months period is proof of the husband's resolve to divorce. On the expiry of the period he loses the option to restore marital relations. A saying of Ali and Ibn Omar conveys much the same sense. But another saying of the last two companions, that has the support of Hazrat Ayesha, too, states that a notice has to be served on the husband either to restore the marital tie or to dissolve the marriage. But a careful look at the words of the verse suggests the plausibility of the first view. The verse clearly sets a four months limits. That means that the right of restoration can be exercised only within this limit. On its expiry there is no way left except divorce and separation.³ If the man is

given the right to restore marital relations after four months, it will amount to the extension of the time limit set by the Book of Allah.

INJURY AND OPPRESSION

If the husband develops a dislike for the wife, has no intention to keep her and still retains her just to torment and oppress her; or if he goes on divorcing her and after two pronouncements, keeps restoring the marital bond, the Quran strongly condemns his behaviour as tyrannical:

"And do not retain them for injury so that you exceed the limits. And whoso does this, he indeed wrongs his own soul. And do not take Allah's commandments for a mockery". (2: 231)

As for the interpretation of the words of a law which runs contrary to the objectives and the spirit of the law amounts to making a mockery of the law. After the pronouncement of one or two divorces, the husband has been given the right to restore marital relations only to facilitate reconciliation, born after tempers cool. This is a safety valve mercifully granted by Allah as a check on the volatile human nature. However, if someone takes undue advantage of this concession and indulges in the ugly game of pronouncing divorces and going back on them again and again, it amounts to making the Divine concession a plaything. He neither wants to keep her (the woman) nor wants to let her marry another man. No true believer can ever think of making such a mockery of Allah's commandments.

Anyone who retains a woman just to torment and oppress her may concoct all kinds of ways to cause her mental and physical torture. If he comes from the lower social strata, he may resort to filthy language and beating; if from the upper strata, he may use more subtle ways of disgracing and torturing her. All these acts, whether crude and subtle, amount to injury and oppression and are forbidden by the Quran. A husband who hands out such treatment to his wife exceeds Allah's limits. His wife is entitled to get rid of him, with legal help.

NOT BEING JUST TO WIVES

When there are several wives, it amounts to oppression to incline exclusively to any one of them, leaving the second wife or the rest of the wives suspended. The Quran explicitly declares this as unlawful. "Do not lean exclusively to one of them, leaving the rest of them suspended". (4: 129)

Polygamy has been permitted by the Quran on the condition that justice be done to all wives. If a man is unable to do justice, he has no right to avail of this conditional permission. The verse permitting polygamy clearly warns that a man who fears that he will be unable to do justice should be content with only one wife:

"But if you fear that you will be unable to do justice, then have only one wife or the slave you possess. This is more equitable, lest you should deviate from the path of truth". (4: 3)

Imam Shafi'i suggests that the implication in "Lest you should deviate" is that more wives will mean too

many children to be looked after properly. But the meaning of the Arabic word "*Awl*" does not lend support to this interpretation. "*Awl*" means to lean and the word is used to indicate injustice and oppression. Ibn-e-Abbas, Hassan, Mujahid, Sha'abi, Ikrimah, Qatadah and others agree that the meaning of "*La Taooloo*" is: Do not deviate from the path of truth. This verse of the Quran proves that if a man does not do justice to his wives and leans towards one of them at the cost of the rights of the others, he is an oppressor. He has no right to avail of the permission for more than one wife. The law should force such a man to have only one wife. The rest of his wives should have the legal rights to get rid of him.

Referring to justice, the Quran has made it clear that so far as emotional attachment is concerned, it is beyond a man's nature to practise equality in this regard — nor is he under obligation to do this. But he is certainly under obligation to practise equality among his wives in the matter of living expenses, social contact and other marital relations.

The law can intervene in the above-mentioned three forms of oppressions by the husband. In addition to these, other problems arise in the mutual relations of the spouses. They stem from the lack of love and compassion and are outside the ambit of the law. For coping with such problems the Holy Quran has given men sound, ethical advice. They are told to be kind, loving and generous towards women folk. Islamic marital law frowns upon unhappy and broken family life. As long as the marriage tie is there, the wife has to be well-treated. In case the tie breaks, she should be released with kindness. Good treatment cannot be en-

forced by law. The little problems of day-to-day life are beyond the reach of law. However, the Islamic marital law seems to place the greater burden of maintaining the climate of fair play, love and compassion on the shoulders of the husband.

RIGHTS OF THE HUSBAND

The responsibilities placed on the man because of his role as the guardian have been discussed above. Now we look at rights, stemming from this role:

I. *Vigilance in his absence:* The first right the husband has on the wife is that she should keep a firm vigil, in his absence, over everything that belongs to him. In the words of the Quran: "Good wives are obedient, and keep a vigil under Allah's protection, when the husband is absent." (4: 34)

During the husband's absence, a good wife keeps a watchful eye on everything belonging to him and placed in her charge as a trust. She has to protect not only his property and his secrets, but his honour, his children and the purity of his lineage. Any failing on her part to discharge this all-important function, entitles the husband to use powers that will be discussed ahead.

II. *Obedience:* As stated in the above verse, good women have also to be obedient to husbands. The details of this general commandment have been given by the Holy Prophet (peace be on him):

"Surely, you have right on them not to let in anyone, whom you dislike".

"The wife has no right to give away anything from his home without his permission. In case she does this, the man gets the reward for the charity and the woman will bear the burden of sin. Nor can she leave the home without his permission."

When the husband is not away, the wife should not keep even a single day's optional fast without his permission. This does not apply to fasting in Ramzan.

"The best wife is the one who is attractive in your eyes, who carries out your instructions and when you are absent keeps a watchful eye on your right to your property and your right on her".

The general mandate for obedience has only one exception, i.e., if the husband tells her to sin, she can refuse to obey, rather should refuse to obey him. If, for example, the husband tells her not to offer the obligatory prayers, or not to keep the obligatory fasts, or to drink liquor, or to give up the prescribed veil, or to indulge in indecencies, she is duty bound to reject such orders. No one has the right to force anyone to violate the commandments of Allah, the Almighty. With this exception, the wife must obey her husband in all cases. In case of disobedience, the husband will have the right to use his powers, as discussed below.

MAN'S POWERS

The Islamic marital law makes man the manager of the family affairs. It places on him the obligation of paying the wife a dower and her living expenses. It makes him responsible for her care and well-being. It

is only natural that he should be given powers for the orderly running of the household, protection of its moral behaviour, social harmony of the home and guarding against tresspass on his own rights. The Islamic law clearly enunciates these rights and also defines the limits within which they can be exercised.

I. Counselling, Admonition, Punishment: In case the wife disobeys the husband, or does away with any of his rights, the man should first counsel her. If this fails to be effective, he has the right to be reasonably stiff in dealing with her. And if this too goes unheeded, he may give her light beating, so that she sees reason to obey him.

"As for the women from whom you fear refusal to protect your rights, counsel them, and leave them alone in their beds and chastise them. But if they obey you, take no stern action against them". (4: 34)

In the above verse, leaving alone in beds means refraining from sex as a punishment. But such punishment, as has already been discussed, cannot be extended beyond the natural limit of four months. A woman who is so reckless and wild-tempered that she angers her husband to the extent of not sharing the bed with her, is certainly not a normal woman. And if even this punishment fails to bring her to senses and she persists in her disobedience, knowing well that at the end of four months her husband will be under legal obligation to dissolve the marriage tie, she deserves to be divorced. The four-month period is enough to reform a person. Persistence in hostility for four months is evident that she is devoid of the ability

to reform herself. She certainly is unable to live in harmony with the present husband. The continuance of their marriage tie threatens to kill the very objectives for which they were tied together. Such a situation may drive the husband to seek satisfaction of the sexual urge in extra-marital relations. The wife, too, could easily slip into the same snare. Whenever one of the spouses is overly stubborn and ill-tempered, the relationship of love and compassion is hard to sustain.

Imam Sufian Sori has given a different meaning to the words of the sentence "Leave them alone in the beds". He suggests that the meaning is: Tie them down in homes. But the words of the verse do not warrant this meaning. The use of the word "bed" clearly indicates the exact meaning the Quran wants to convey.

The second punishment that has been permitted only in very serious cases is to give a beating, but for this the Holy Prophet (peace be on him) has laid down the caution that the blow should not be severe.

"If she disobeys some reasonable order of yours, give her a beating that is not very painful. Do not strike on the face and do not use filthy language". (Hadith)

The husband has been permitted to inflict these two punishments but as cautioned by the Holy Prophet (peace be on him) punishment is permissible only when a legitimate right of the man has been violated. It would be foolish to insist that every order, whether reasonable or not, should be carried out and in case of non-compliance the woman should be

punished. Also there should be some balance between the fault and the punishment. One of the cardinal principles of the Islamic legal code is: "He who wrongs you should be wronged by you to the extent to which you have been wronged." It amounts to injustice to inflict a punishment out of proportion to the wrong done to somebody. Where counselling can suffice, it will be inadvisable to cut off relations; where cutting off the relationship suffices, it will be injustice to stop sharing the bed; and where withholding sex is enough, it will be cruel to inflict beating. Beating is the severest of punishments and is permissible only in very serious and unbearable misconduct. In this case, too, the limit prescribed by the Holy Prophet has to be borne in mind. If the limit is over-stepped, it will amount to cruelty on the man's part. That will give the woman the right to get legal help against him.

II. Divorce: The second right given to the man is that he can divorce the wife with whom he cannot pull on. Since he gets marital rights by spending money on her it is he who has been granted the powers to give up these rights.⁴

This right cannot be given to the wife. If she were to be given this right, she would become fearless and over-bold and easily violate the man's rights. It is evident that if a person buys something with money he tries to keep it as long as he can and he parts with it only when he is left with no options. But when a thing is purchased by one individual, and the right to cast it away is given to another, there is little hope that the latter will protect the interest of the buyer who invested the money. Investing man with the right to

divorce not only amounts to the protection of his legitimate rights but also ensures to check the growth of the divorce rate.

References

1. This kind of an agreement to pay dower is termed as the deferred dower. The current practice is that at the time of marriage a huge amount is specified as the dower, in a document of marriage. The general comment is "This is just a formality. Who is going to ask for the payment?" How very unfortunate! In the light of the above quoted Quranic verses a marriage solemnized with the ill-conceived intention of non-payment of the dower, is a nullity in the eyes of Allah. A truly deferred dower must specify the time within which the dower is payable. Where no time is specified, the dower is payable on demand. Some ignorant jurists are of the opinion that such a dower is payable on the death of the husband. This is, to say the least, strange logic, unsupported by the Quran or the Sunnah.
2. *Ahkam-ul-Quran* by Ibne Arabi Vol. I, page 75.
Hidayat-ul-Mujtahidin by Ibne Rushd Vol. III, page 88.
3. It is controversial issue whether this should be just one divorce or three divorces providing for restoration.
4. Some people who like Western ways, want to take away the right of divorce from the husband and hand it to the court. This has been done in Turkey. But this practice is contrary to the Quran and the Sunnah. In its discussion on the law about divorce the Quran has consistently ascribed the act of divorce to the husband. "If you divorce the woman", "If he divorces her". "If he decides on a divorce", etc. Quranic verses provide clear testimony that it is the husband who has been invested with the power to divorce. In the second chapter the Quran unequivocally declares: The marriage tie is in his hands (2: 237). In the face of this mandate, who is there to take this right away from his hand and place it in the hand of a judge? There is a Hadith on the authority of Ibn-e-Abbas in *Ibn-Majah* to the effect that a man came to the Holy Prophet and complained that his master had married his slave to him and now wanted to separate her from him. At this the Prophet of Allah delivered an address to the people: "O People. What is this happening around us? One of you married his maid to his slave and now wants a separation between them. The right of divorce belongs to the husband." This tradition may not be very reliable but it has the strong support of the Quran. So, both according to the verdict of Allah and his Messenger, it is not lawful to deprive the husband of the right to divorce and hand over this right to the court. This step is wrong even on grounds of common sense. This can only lead to exposing shameful domestic affairs in courts as is happening in Europe.

THE SECOND PRINCIPLE

The second principle of the Islamic marital law is that the bond of marriage should be strengthened as long as possible and utmost efforts should be made to keep the marital union intact. However, when all hope of containing the love and compassion between them is gone and the marriage becomes a danger to the objectives of the law, no insistence should be made on keeping the unwilling partners tied together, despite their mutual hatred, dislike and distrust. In such a situation it is in their interest, as well as in the interest of the society, that their separation be permitted. In this matter, the Islamic law has maintained a balance between its concern for the demands of human nature and its regard for the preservation of the social good. This balance has no parallel in any other law of the world. Islam does seek to make the marriage tie strong, but unlike Hindu or Christian law, it does not make it unbreakable, even though the married life of the spouses may have degenerated into intolerable misery. So Islam keeps the door of separation open but not so wide open as it is in the present-day Russia, U.S.A. and most other Western countries, where the marital tie is free from all restraints. In those countries the weakening of the marriage bond is the source of all disruption in family life. The three modes of separation allowed under this principle are:

- i) Divorce
- ii) *Khula* or divorce claimed by wife
- iii) Decree of the court.

CONDITIONS FOR DIVORCE

In the technical language of the *Shari'ah*, divorce means the separation which the husband wants as a matter of right. He is free in the exercise of this right. He may, whenever he likes, relinquish the marital rights obtained in exchange for the dower. However, the *Shari'ah* strongly disfavours divorce. In the words of the Holy Prophet: "In the eyes of Allah it is the most hateful of the lawful things." Another saying is: "Marry and do not divorce, for Allah does not like men and women whose only aim is the satisfaction of their sexual lust." Though the husband is free to exercise the right to divorce, he has been placed under checks which allow him to use this right only as a last resort. The verdict of the Quran is that a man should do his best to pull on with his wife even though he does not like her:

"Treat them (women) well, though you dislike them. Maybe you dislike a thing and Allah has placed in it great good for you." (4: 19)

However, if it becomes impossible to pull on together, the right to divorce can be exercised. But it should not be a head-long plunge. There should be three divorces, spaced by three periods of menstruation. By the time of the third cleansing, there will be plenty of time for second thoughts. Some way of reconciliation may, after all, be found. A pleasant change may come in the attitude of the woman or the man may change his mind. But if even at the end of three periods of waiting and cool thinking the husband feels convinced that he must leave the woman, he may

divorce her at the end of the third period, or he may let the period pass by, without restoring conjugal relations.¹

"Divorce is to be pronounced twice. Then either keep them in kindness or release them in kindness." (2: 229)

"And the divorced women should keep themselves in waiting for three menstrual courses. And their husbands have a better right to take them back during this period, if they desire reconciliation". (2: 228)

Another significant Quranic injunction is that during the period of waiting the woman should not be sent away but should be retained, in the hope that living together might unite hearts:

"O Prophet, when you divorce women, divorce them for their prescribed period, and calculate the period, and fear Allah, your Lord. Do not turn them out of their homes, nor should they themselves leave; unless they commit an open indecency. And these are the limits set by Allah. And whoso goes beyond the limits of Allah, he indeed wrongs his own soul. You do not know that Allah may, after this, bring about reconciliation. So when they have reached their prescribed period, retain them in kindness or release them in kindness". (65: 1, 2)

Divorce is not permissible during the course of a menstrual discharge. If divorce becomes a necessity, it should come during the period of purity. There are two reasons behind this injunction.

First, during the course of menstrual discharge women generally become glum and ill-tempered. Changes in their body chemistry provoke them to do things which they would not do in normal days. This is a medically proved fact. That explains why disputes arising between husband and wife during the course of a menstrual discharge are not considered a sufficient ground for divorce.

Secondly, during this period the bodily contact, which is an important factor in the mutual attachment of the spouses, is suspended. This can breed estrangement between them. But when the temporary barrier is no more, the serene intimacy of conjugal relations is likely to brush off from the mind any lurking thoughts of separation; the spouses are united together once again into an integral whole.

It was on these grounds that the Holy Prophet (peace be on him) disapproved of divorce during the course of menstrual period. Abdullah bin Omar divorced his wife during menstruation period. Hazrat Omar reported the case to the Holy Prophet. He felt upset and told Omar to direct his son to retain his wife and divorce her after she was cleansed. Another report states that the Holy Prophet (peace be on him) reprimanded Abdullah for this act of his and explained to him the right procedure thus:

"Ibn-e-Omar! You adopted a wrong procedure. The right way is to wait for the period of cleansing. Then let there be a pronouncement of divorce at the beginning of the next cleansing. When she gets cleansed the third time, you may divorce her or retain her."

At this Abdullah asked: "Messenger of Allah, if I had made the three pronouncements of divorce simultaneously, could I still have the right to retain her"? The reply was: "No, she must be separated and you have sinned".

This ruling of the Holy Prophet conclusively proves that the simultaneous pronouncement of three divorces is a sin. The simple reason is that this act runs counter to the values of the Islamic law. It oversteps the limits of Allah, respect for which has been strongly stressed by the Quran in Verses one and two of Chapter 65.²

It is reported of Omar bin Khattab that if someone came to him with the report that he had made three simultaneous pronouncements of divorce, he would give the wretch a beating and would declare that he and his wife stood separated.

Ibn-e-Abbas was asked what he thought of the man who had made three simultaneous pronouncements of divorce. His reply was:

"He has disobeyed Allah, his Lord. His wife stands separated."

Hazrat Ali summed up his views on the problem, thus:

"If people had fully kept in mind the limits set by Allah for divorce, no one could have any cause to repent after the separation of his wife."

On top of all the hurdles for pronouncing divorce, there is the last and the toughest in which a man, who stands separated from his wife by an irrevocable divorce, cannot remarry her. If she marries any other man, has conjugal relations with him and then the man, of his own free will, divorces her, only then can she remarry her former husband.

"So if a man makes the third pronouncement of divorce, the woman is no longer lawful for him, unless she marries another man." (2: 230)

This condition is so hard that it will make a man think a hundred times before he makes the third pronouncement of divorce. He will divorce her only if he is fully convinced that he can never pull on with the woman.

To get around this tough condition, some people have devised a trick. If after pronouncing an irrevocable divorce someone regrets the decision and wants the woman back, a spurious marriage is arranged between her and another man, who, in return for the money he is given, undertakes to divorce her, without touching her. But this trick cannot escape the clear ruling of the Holy Prophet (peace be on him):

"A divorced woman is not lawful for the first husband unless she marries another man and he has shared bed with her."

The Messenger of Allah cursed the man who gets his divorced wife married to another man, only with the purpose of making her lawful for him. He also

cursed the man who solemnizes such a marriage. He likened both of them to hired bulls. As a matter of fact such sham marriages are only a flimsy cover for fornication. It is surprising that some of the *Ulama* provide legal justification for such marriages.

KHULA

Man has been granted by the *Shari'ah* the right to divorce his wife whom he dislikes and with whom he can in no way pull on. In the same way the *Shari'ah* has given the woman the right to demand separation from her husband whom she dislikes.

The mandates of *Shari'ah* on this matter have two aspects, namely, the moral aspect and the legal aspect.

The moral aspect of *khula*, like the moral aspect of divorce, is that it has to be used as a last resort, and not for the fulfilment of carnal desires. *Khula* and divorce should not be made playthings. The point has amply been made clear by the Holy Prophet (peace be on him):

"Allah does not like sex-hungry men and sex-hungry women. Allah's curse falls on the sex-hungry man who is prone to divorce women."

"A woman who obtains a separation from her husband, without any misbehaviour on his part, stands cursed by Allah, by the angels and by humanity."

"Women who make *khula* a plaything are hypocrites."

However, the law which is concerned with the demarcation of people's rights does not discuss this aspect. Just as it gives man the right to divorce as a husband, much in the same way it gives woman the right of *khula*. This makes it possible for both of them to get rid of the marriage tie, if such a need ever arises. The purpose is to forestall a situation where there is hatred in the hearts, the objectives of marriage remain unfulfilled, the marriage tie has become a curse but still the two spouses are under compulsion to stay together because they feel that there is no way out. As for the improper use of rights by either one of the spouses, all that the law can do is to lay down reasonable and workable restraints. However, the proper or improper use of a right depends, for the most part, on the discernment, integrity and the piety of the person exercising the right. Only the person concerned or Allah knows whether the right is being exercised to meet a real need or just for sensual pleasure. The law grants natural rights and hedges them round with necessary restraints to check improper use. In the discussion on divorce you have noticed that a man is given the right to divorce his wife but at the same time several checks have been placed on him. He has to forgo the dower he gave her; he is not to divorce her during the menstrual course; he should give three divorces during three periods of cleansing; he should keep her with him during this period of waiting and when at last the three divorces have been pronounced he should not remarry her unless she has had conjugal relations with and divorced by another husband. In the same way a woman has been granted the right to get a separation but some restrictions have also been placed on her:

"And it is not lawful for you to take any part of what you have given them; unless both spouses fear that they cannot keep within the limits set by Allah. Then if you fear that the spouses cannot keep within the limits of Allah, there is no blame on the two of them for what she gives up to become free thereby." (2: 229)

The following mandates follow from this verse:

- i. *Khula* demands a situation in which there is a fear that the limit set by Allah may be violated. The words 'There is no blame on the two of them' suggest that though *khula* is undesirable like a divorce, when there is a fear that the limits of Allah might be violated, there is no harm in obtaining a *khula*.
- ii. If a woman wants to break the marriage tie, she should part with money just as a man has to forego the dower when he chooses to divorce the wife. In case of divorce by the husband, he has to forego all that he has given to the wife. But if the wife wants separation, she is entitled to it on giving back part or all of what she received from the husband.
- iii. The mere wish of the wife to repudiate the marriage tie by returning what she has been given is not enough for obtaining a *khula*. The husband, too, should be willing to accept payment and let the wife go. In other words the woman cannot part with some money and leave the husband. Separation will be legally effective only when the husband accepts the money she offers and divorces her.

- iv. *Khula* becomes final when the woman demands separation on payment of a part, or the whole, of the dower, and the man accepts the payment and divorces her. The words of the Quranic verse show that *khula* needs only the mutual agreement of the spouses. This verse contradicts the view of those who feel that *khula* has to be supported by a decree of the court. Islam does not like dragging into courts things that can be settled at home.
- v. In case the wife offers to buy freedom from the marriage life and the husband turns down the offer, she has the right to go the court. The words of the verse "Then if you fear that the spouses cannot keep within the limits of Allah" clearly indicate that the word "you" refers to the men of authority among Muslims. It is their foremost duty to protect the limits set by Allah. They are duty bound to look into the woman's case and if they are convinced that there is the fear of Allah's limits being violated they ought to let her exercise the right she has been granted to respect Allah's limits.

These brief mandates give no details of the circumstances which amount to the fear of overstepping Allah's limits. Nor is there any hint as to what should be the reasonable amount of ransom money or what the judge is to do if the husband refuses to accept a reasonable amount being offered. However, these details can be ascertained from the *khula* cases brought to the Holy Prophet (peace be on him) and to the four caliphs who succeeded him.

KHULA PRECEDENTS FROM EARLY HISTORY

The most well-known *khula* case is the one in which the wives of Thabit bin Qais got separation from him. Fragments of this case lie scattered in the books on Hadith. Pieced together, these fragments shed a good deal of light on the various aspects of *khula*.

Thabit had two wives. One of them was Jamilah, the sister of the infamous hypocrite leader, Abdullah bin Ubayy. Jamilah did not like the looks of Thabit. She approached the Holy Prophet (peace be on him) with a *khula* petition. She said:

"Messenger of Allah! Nothing can keep the two of us together. As I lifted my veil, I saw him coming, accompanied by some men. I could see that he was the blackest, the shortest and the ugliest of them all.

"By Allah I do not dislike him for any blemish in his faith or his morals. It is his ugliness that I dislike. Had the fear of Allah not stood in my way, I must have spat on him when he came to me. Messenger of Allah, you can see how good-looking I am. But Thabit is an ugly man. I find no fault in his faith or his morals. But I am afraid my desperation might drive my Islam closer to disbelief."³

In reply to her petition, the Holy Prophet (peace be on him) asked "Will you give back to him the garden he gave you?" Her reply was, "Certainly, O Messenger of Allah. I am prepared to give even more." "No, nothing more. Only give him back his garden," said the Messenger of Allah. He summoned Thabit and told him to accept the garden and divorce the woman.

Thabit's second wife was Habibah. Her story has been narrated by Imam Malik and Abu Dawood as under:

One morning as the Holy Prophet (peace be on him) stepped out of his house, he found Habibah standing by the door. He asked her what she wanted. She burst out "Messenger of Allah! Thabit and I cannot pull on together." Thabit was summoned. Habibah repeated her petition. "Messenger of Allah, I have with me all that Thabit gave me." The Holy Prophet (peace be on him) told Thabit to take back what he had given and to divorce the woman.

Reporting from the Hazrat Ayesha, Abu Dawood and Ibn-e-Jarir state that Thabit had given Habibah a severe beating, breaking a bone. She complained to the Holy Prophet (peace be on him) who told Thabit to take back part of what he had given to Habibah and divorce her.

However, Habibah's words, as reported by Ibn-e-Majah, show that Habibah said nothing about the beating. Her only complaint was about the man's ugly looks and she too expressed her disgust, declaring that but for Allah's fear she must have spat on Thabit's face.

In another case, a man and wife were brought before Caliph Omar. The woman pleaded for *khula*. Omar counselled her to patch up and try to pull on with the man. She was adamant. Omar ordered that she be kept alone in a cell for three days. On the fourth day she was produced before him. Asked how

she felt, she declared on oath that those were the three nights of peace she had known in years. Omar was moved by the depth of her misery. Summoning the husband he delivered his judgement "Grant her separation, even though it be in return for her earrings."

Rubay'ah, daughter of Muawwiz, sought separation from her husband in return for all her property. The husband did not accept the deal. The case was brought to Caliph Osman, who accepted the woman's plea and allowed the husband to take, in return for separation, all that belonged to the woman, even her head covering.

MANDATES CONCERNING KHULA

The above quoted precedents highlight the following points:

- i. The complaints made by the two wives of Thabit bin Qais provide an illuminating commentary on the Quranic Verse, "So if you fear that the two spouses will not be able to keep with the limits of Allah." The ugliness of the husband was considered by the Holy Prophet (peace be on him) a sufficient cause for *khula*. No comments were made by the Holy Prophet (peace be on him). He had his eye on the objectives of the *Shari'ah*. Feeling convinced that the women had deep dislike for the man, he decreed their separation, knowing full well that keeping them tied to the man will only add to their bitter hatred and could lead to far more undesirable results, both morally

and culturally, than *khula*. Such results could deal a death blow to the objectives of the *Shari'ah*. The clear deduction from this precedent is that for enforcing the decree of *khula* all that is needed is the proved evidence of the woman's deep dislike for the husband and her refusal to live with him.

- ii. The precedent set by Caliph Omar shows that the judge can take suitable steps to establish, without a shadow of doubt, the woman's hatred and dislike for the husband, so he can be sure that there is little hope left for the couple to pull on together.
- iii. Omar's action also shows that it is enough for the judge to gauge the intensity of a woman's hatred and disgust. He need not dig into the causes that generated hatred and dislike. It is reasonable to presume that a woman can dislike her husband for reasons she cannot disclose to others. Maybe she dislikes him on grounds that may appear insufficient to others but which are unbearable for her, because of their cumulative effect. So the only business of a judge is to make sure that the woman bears hatred towards the man. It is none of his business to weigh the reason she is giving and to see whether or not they are sufficient to generate hatred.
- iv. The judge is free to counsel the woman and persuade her to pull on with the husband. But he cannot force her against her will to do so. *Khula* is a right granted to her by Allah. If she expresses

the fear that she will not to be able to keep within the limits of Allah, in case she stays tied to the man, no one has the right to tell her that she must pull on with the man, no matter what happens to the limits of Allah.

- v. In *khula* cases the judge does not have to find out whether the woman's request for separation is based on a genuine need or whether it is actuated by sex-hunger. That explains why the Holy Prophet (peace be on him) and the caliphs did not touch upon that point when dealing with *khula* cases. As a matter of fact a thorough probe into this problem is beyond the power of a judge. Moreover, the woman has been granted the right of *khula* to match the man's right to divorce. In both cases the likelihood of sex-hunger is there. But the man's right to divorce is not postulated on the condition that it shall not be used for sex-hunger. So, as a legal right, *khula* should also be free from all restraints.

The third point to be borne in mind is that a woman may demand separation either on genuine grounds or just for sex-hunger. In the first case it will be unjust to turn down her demand. In the second case, the refusal to grant *khula* will destroy the important objectives of the *Shari'ah*. A woman, who is sex-hungry by temperament, is sure to devise ways for the satisfaction of her passions. Finding the rightful ways blocked, she will resort to illegal ways which will certainly be worse. A woman who marries fifty husbands, one after another, is better than the one who marries only one husband but commits a single fornication.

- vi. If a woman makes a demand for *khula* and the husband turns it down, the judge would tell him to let her go. All precedents show that in such cases the Holy Prophet (peace be on him) and the caliphs ordered the man to accept money and leave the woman. In any case, the decree of the judge is binding on the parties seeking legal help. In case of default the judge can put the defaulters in jail. In the *Shari'ah*, the role of the judge is not that of an adviser. His decree is not an advice to be accepted at will. Relegated to such a position, the court becomes meaningless for the people.
- vii. The separation resulting from *khula*, as explained by the Holy Prophet (peace be on him), amounts to an irrevocable divorce. It takes away from the husband, once for all, the right to revive marital relations. The survival of this right obviously nullifies the very purpose of the law (*khula*). Moreover, the payment made by the woman to the man is the price paid for freedom from the bond of marriage. In case she is denied this freedom after making the payment it will amount to cheating on the husband's part, which the *Shari'ah* cannot allow. However, if the woman wants to remarry the man, she can do so; but only after she has had marital relations with another man and has been divorced by him.
- viii. No limit has been set by Allah on the amount to be paid as the price of *khula*. It is up to the spouses to agree upon any price. However, the Holy Prophet (peace be on him) did not approve of anything beyond the dower given by the husband. His view on this point was:

"The man granting *khula* should not take from the woman more than what he has given her". Ali, too, considered it undesirable that a price higher than the dower should be demanded. This view has received the support of all leading jurists. It has even been suggested that if it is the cruelty of the husband which is goading the woman to demand *khula*, it is undesirable that the man should receive anything.

The standard handbook of *Shari'ah* law, "*Hidaya*" states: If separation is the result of his ill-treatment, it is undesirable that he should receive from her a price. These comments and observations lead to an obvious conclusion, viz., if a woman demanding *khula* can prove her husband's cruelty, or can show other reasonable grounds for *khula*, she should be granted *khula* on giving back half the dower or even less. However, if she cannot prove either of the two things, she should be called upon to return the whole of the dower or the greater part of it. In case the woman's behaviour betrays sex-hunger, the judge can punish her by making her pay more than the dower.

BASIC ERRORS ABOUT KHULA

The discussion of *khula* has made it clear that Islamic law maintains a balance between the rights of the man and woman. It is an error on our part that we have, in actual practice, deprived women of the right of *khula*. Contrary to the principles of the *Shari'ah* we have left *khula* to the will of the husband. This has led to and is still evident in the denial of justice to women for which the law promulgated by Allah and his Messenger is not to blame. If this right of women can be

rehabilitated even today, many of the problems plaguing our marital affairs will be solved. In fact, most of them will not arise at all.

The element that has practically robbed women of the right of *khula*, is the mistaken belief that the Law-giver has left *khula* entirely to the spouses and the court has nothing to do with it. The result is that it is only up to the man to grant or deny the woman a *khula*. If the woman wants *khula* and the husband, out of selfishness or sheer mischief, does not grant this, the woman is left with no option and solution. This situation is contrary to the intention of the Law-giver. The Law-giver had no intention whatsoever to make one of the parties to the marriage bond helpless and place all powers in the hands of the other party. Had it been so, the lofty moral and cultural objectives associated with marriage would have been meaningless.

It has already been explained that the Islamic *Shari'ah* bases the marital bond on the principle that as long as this bond can be maintained with moral purity, love and compassion it is laudable and imperative to strengthen it and reprehensible to break it or have it broken. When this bond becomes a source of moral transgression for both or one of the spouses or in place of love and compassion it gets permeated with hatred and disgust, its dissolution becomes necessary and its continuance runs counter to the objective of the *Shari'ah*. To serve this basic principle, the *Shari'ah* has equipped both parties to the marriage bond with a tool with which they can solve their problems, in case the marriage tie becomes unbearable. The tool given to the husband is the divorce,

which he is free to use, and the woman is equipped with the legal tool known as *khula*. The procedure laid down for the use of this tool is that in case she wants to do away with the marriage bond, she must first put the demand before the husband. If he turns it down she must have recourse to the court.

That is how a balance, enjoined by Allah and His Messenger, can be maintained between the rights of husband and wife. But this balance was upset by doing away with the powers of the court. The elimination of the court made the legal tool given to the woman worthless. In actual practice the law got corrupted to mean that in case the marriage bond gives man the fear of breaking Allah's limits or it becomes unbearable for him, he can snap it off. But if a similar fear grips the wife or marital life becomes unbearable for her, she has no way of doing away with the marriage bond. So long as the husband himself does not let her go, she is obliged to remain tied down any way, though it may be impossible for her to keep within Allah's limits and the lofty objectives of the marriage bond may go to the winds. Does anyone have the courage to place the blame for such glaring injustice on the law given by Allah and his Messenger? If anyone has the audacity to say so, he shall have to prove on the authority of the Quran and the Sunnah, not on the authority of quotations from jurists, that Allah and His Messenger gave no powers to the court in *khula* cases.

POWERS OF THE COURT IN KHULA

Read again the verse of the Quran stating the law on *khula*:

"If you fear that they (the spouses) will be unable to keep within the limits of Allah, there is no blame on the two of them, if she (the wife) gets separation on payment of ransom". (2: 229)

This verse speaks of the spouses in the third person — (They). So the pronoun "you" cannot refer to them. Inevitably it has to be conceded that it is the people invested with authority by the Muslims who have been addressed. The Divine mandate means that in case the spouses cannot arrive at an agreement in a *khula* case, the matter should be referred to the people of authority.

This interpretation of the verse is supported by the *khula* precedents already quoted. The mere fact that women came to the Holy Prophet (peace be on him) and to the caliphs with *khula* petitions and they decided these cases, conclusively proves that in case of disagreement between the spouses on *khula*, the wife should have recourse to the law. If the judge can only hear such cases and has no power to enforce his decisions on an unwilling husband, recourse to the court will be an exercise in futility. Do the traditions prove that the judge has no power in *khula* cases? *Khula* cases decided by the Holy Prophet (peace be on him) and his caliphs quote commands like "Divorce her". "Get separated from her", "Let her go" or as the reports say: He ordered the man to.... The report from Ibn-e-Abbas quoted by Ibn Jurair is: He separated the two of them. The same words have been used in the reports from Jamilah herself (the woman who got *khula*). These facts leave no room for doubt about the courts' powers in *khula* cases.

Now, can a judge impose his decision on the husband who may look upon the court's decision just as an advice and may ignore it? We come across no such precedent, in the time of the Holy Prophet or in the time of the caliphs who succeeded him. Of course, Ali did have to tell a head-strong husband: "You shall not be let off unless you accept the verdict of the two arbiters as your wife has done". If Ali, as judge, could put a husband in prison for not complying with the verdict of the two arbiters, he would certainly have jailed him if he had ignored his verdict. Moreover, there is no sense in depriving the court, in *khula* cases, of powers which it normally exercises in other cases. In books on law cases one comes across situations where the judge is given the powers to separate the spouses, in case the husband ignores his verdict to divorce the woman. Then why should the judge not have this power in *khula* cases.

In the pages that follow, we will look at the remedial measures prescribed by noted jurists, in case the husband turns out to be impotent, eunuch, leper or feeble-minded. In a like manner, fresh ground has been broken in the form of legal clauses giving the spouses married in infancy, the option to retain or dissolve the marriage tie. In this background, it becomes all the more necessary that in granting *khula* to the woman, the court should be given full powers. Unless this is done the helpless women who are refused *khula*, would either resign themselves to life-long misery or would be driven to commit suicide. The other alternatives before them are to satisfy their natural passions through sin or to get rid of the marriage bond through apostasy. An example will make the point clear:

In case of the husband's impotency, the verdict of the jurists is that the man should be given a year's time limit for medical treatment. After the treatment if he is able to have even a single sexual intercourse, the woman loses her right to get the marriage dissolved, even though the intercourse may not have been to her full satisfaction. If the woman was aware of the man's impotency at the time of marriage and still gave her consent to be tied to him by marriage, she is debarred from seeking a legal remedy. If she had even a single intercourse with the husband after marriage and then he turned impotent, she loses her right to go to the court. In case the woman learns about the husband's impotency after marriage and still agrees to live with him, she gets debarred from getting the marriage dissolved. In these cases, the woman stands debarred from demanding the dissolution of the marriage bond. The only legal course for her to get rid of the worthless husband is to demand *khula*. But unfortunately she finds this door also closed. The husband is not willing to leave her even if she is ready to pay him more than the dower he had given. She seeks help from the court but is told that it is not empowered to force the man to divorce her, or to separate the two of them by a decree.

Just contemplate the fate of this luckless woman. The options before her are suicide or the killing of her passions like a Christian nun by undergoing soul chilling privations in secluded life. The two other options are, a life of sin within the bonds of marriage life or bidding farewell to Islam. But is this the intention of the Islamic law to confront women with options like these? Can marital relations of this type achieve the

objectives which inspire the Islamic marital law? Can such spouses have love and compassion for each other? Can they render any service to society? Can the angels of happiness and bliss ever step into their home? Can such a bond of marriage have the remotest claim to be called a shield against sin? Can it hope to defend faith, morality and chastity? If the answer is no then who is to blame for ruining the life of an innocent woman; driving her into a life of sin or goading her out of the pale of Islam? Surely, Allah and His Messenger are not to blame because there are no blemishes in the law they gave.

THE SHARIAH TRIBUNAL

The foregoing discussion on divorce and *khula* makes it clear that Islamic marital law is based on the postulate that the marriage bond as long as it endures, should be a symbol of respect for the limits of Allah and for mutual love and compassion. The Quran calls this the retention of the tie in the proper way. If such a union becomes impossible, the spouses should separate in a nice manner. In other words, the spouses either live together in harmony or separate in kindness. Their differences should never be allowed to develop into situations which embitter their lives, trigger disputes among families, spread indecencies in society, encourage immorality and hand down evil traditions to the coming generations. It is to forestall these evils that Islam has given man the right to divorce. The woman has been given the right to demand separation so that she may, if she wants, act upon the Quranic mandate of separating in peace.⁴

References

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1. The best thing is not to pronounce the third divorce but to let the third period pass by. That will leave the possibility of remarriage between the spouses, if they so desire. But with the pronouncement of the third divorce the separation becomes irrevocable. The two of them cannot become spouses again until the woman marries another man and he divorces her in the same manner. The sad thing is that most people are unaware of this legal point. When a man wants to divorce, he hastily pronounces three divorces at a time. Most of them later regret and run after jurists for advice.
 2. The point has already been emphasised that the intention of the Islamic law is to protect the marriage tie. Once a man and woman have been tied together by marriage, the bond should stay as long as possible. It can be dissolved only when all possibilities of their relationship have been fully explored. That is why the law wants that one should decide on divorce only after long and careful consideration. Even after the first pronouncement of divorce, the door for reconciliation should be kept open for three menstrual courses. A man making three simultaneous pronouncements of divorce, throws to the winds all these considerations so essential for the Islamic law.
 3. Fear of Islam being driven closer to disbelief means that if despite her deep dislike and disgust she kept herself tied down to Thabit, she was afraid she might fall short of some of her duties as wife, laid down by Allah and His Messenger. As a true believer, she looked upon this shortcoming as disbelief. Compare this with the thinking of some of the Maulvis of today. They insist on regarding a person a believer, even though he discards daily prayers, fasting, payment of Zakat, the Hajj and openly indulges in gross indecencies. They assure such people of the heavenly bliss and condemn their critics as Khariji'ites.
 4. It should be clearly understood that the Islamic law does not like family disputes reaching the court, in full public gaze. That is why it has provided legal remedy for both the spouses so they may, as far as possible, settle their disputes at home. Recourse to the court is in the last resort, when settlement at home becomes impossible. However, some people are quarrelsome by temperament. They can neither live together in harmony nor can be persuaded to part decently. Moreover, problems arise in conjugal relations where differences arise between spouses regarding their rights. They find it impossible to live together in peace or to separate in peace. That is why the *Shari'ah* has provided, in addition to divorce and *khula*, a third remedy for settling mutual rights and for protecting the limits of Allah. And that is the *Shari'ah* tribunal.

FUNDAMENTAL ISSUES ABOUT THE *SHARI'AH*

Before taking up the issues relating to the *Shari'ah* tribunal some fundamental points need to be clarified.

THE FIRST CONDITION FOR THE COURT

The first condition for the *Shari'ah* tribunal is that it has to be an Islamic court. The judge must be a Muslim. The first reason for this has been clearly stated by jurists in matters relating to Islamic *Shari'ah*, the decree of a non-Muslim may apparently be enforced on Muslims but in reality it does not get enforced. For example if a non-Muslim officer dissolves the marriage of a Muslim couple, it does not get dissolved even though the verdict be in conformity with the law of *Shari'ah* and even though the spouses have been practically separated. In reality, the marriage tie stands intact and the woman is not free to marry another man. If she marries, the marriage will be nullified in the eyes of the *Shari'ah*. Children born of this marriage will be illegitimate. The second reason is that, on grounds of principle, the Quran does not accept the verdicts of a non-Muslim court. In the affairs of Muslims, in particular, its definite stand is that Allah does not approve of non-Muslim court's decisions on Muslim issues. I have fully discussed this issue in an article under the

heading "A very important query" which appears as an appendix at the end of the book.

INDEPENDENT THINKING IS ESSENTIAL

There are always problems the solution of which is left to the judgement of the court. It is true that the *Shari'ah* contains detailed law, but in personal dealings, the particular circumstances of each case have to be kept in mind for interpreting and enforcing the law. Moreover, suitable corollaries have to be drawn and the spirit of the law has to be maintained, while conforming to the conditions given in the chapter on disputes. These functions cannot be discharged unless the judge is capable of independent thinking and possesses, at the same time, a deep faith in and respect for the law he has to enforce. Obviously, these qualities can only be possessed by a judge who is a Muslim by faith, has a full grasp of the Islamic law and its all aspects, fully understands the spirit of this law, is conversant with the sources of this law and has intimate knowledge of the structure of the Muslim society. A non-Muslim judge can never combine all these traits. So it cannot be hoped that he can deliver a sound judgement in cases of Muslim personal law.

HARM DONE IN INDIA BY THE ABSENCE OF *SHARI'AH* BENCH¹

Even after the establishment of the British Rule in India, affairs involving the personal law of the Muslims were, till 1864, settled by Muslim Qazis, who were selected and, like common civil suits, cases involving Muslim personal law were also handed over to the civil

courts established by the British. The first harm resulting from this was that the issues falling under Muslim personal law, according to the principles of the *Shari'ah*, were nearly wiped out. It became impossible for the Muslims to get from the courts a verdict in *Shari'ah* cases which could be looked upon as a legitimate verdict from the point of view of their religion. The second harm, which is in no way less injurious than the first one, was that the office of these courts neither had the means to develop an insight into the principles and branches of the Muslim law, broad enough to ensure independent thinking, nor did they possess a respect for this law that could stop them from overstepping its limits. Their knowledge was drawn from books written by authors like Hamilton, who did not know Arabic. He translated *Hidaya* with the help of a Persian book. He was simply incapable of understanding *Hidaya*. He committed so many blunders in translating the common technical terms of Muslim jurisprudence that one has to refer to *Hidaya* again and again to understand Hamilton. In the same way Ballie's *Digest of Muhammadan Law* consists of the translation of portions from *Fatawa-i-Alamgiri*.

Macnaughton's book *Principles of Muhammadan Law* is a jumble of defective material, concocted and misconceived notions, distorted facts and misinterpretations. Some British judges themselves have confessed their lack of knowledge. Justice Markbee remarks in one of his judgements:

"The means at the disposal of the court for understanding Muslim law are so meagre and narrow that

I am gladly willing to adopt every device to avoid deciding cases involving this law."

With such limited knowledge on their part, these courts have the audacity to set new precedents in Islamic law and going beyond its limits without hesitation because their faith requires no respect for this law nor does the judicial system of the ruling power place any restrictions on them to keep within the limits of the Islamic law. The following remarks of Chief Justice Garth, occurring in the judgement of a case, are enough to underscore the position of these courts:

"Islamic law, to which our attention has been drawn, exists in ancient books. It was enforced centuries ago in Baghdad and other Muslim countries where the legal and cultural background was very different from that of India. In deciding disputes arising among Muslims, we try, as far as possible to follow Islamic law. But in the first place it is very difficult to find out the mandates of this law. It is still more difficult to reconcile differences in the views of the top jurists like Imam Abu Hanifa and his pupils. So we should try, as far as possible, to find out the right principles on which a decree is to be based. Then we should enforce it, keeping in mind the requirements of justice, goodwill and the legal and cultural background of the country."

These remarks clearly show that a judicial officer who concedes his ignorance of the Islamic law and declares his inability to reconcile the conflicting views of the top jurists, openly considers it right that despite

his defective knowledge of the Islamic law he should set new precedents. In one of his decisions, he unhesitatingly declares that in the enforcement of Islamic law among Muslims, he is not bound to keep himself within the limits of this law. He has also to keep in mind the legal and cultural background of the country, the principles of justice as well as his own convictions. The so-called Muhammadan law being enforced by the courts of this country is the product of this independent thinking, which is rooted neither in faith nor in knowledge. Even this defective law is not rightly applied to our *Shari'ah* cases and the situation is deteriorating day by day.

THE FIRST STEP TOWARDS REFORM

The minimum workable arrangement at present for reaching correct decisions of cases involving marriage, divorce, and other *Shari'ah* matters is that the Muslims should have their cultural autonomy. They should be empowered to set up their *Shari'ah* courts where pious religious scholars should be appointed as judges. They should be men of insight and deep knowledge in Islamic law. This need has to be met if it is going to be made for Muslims to lead their lives as Muslims in this country. In case they cannot be granted this right, the minimum which can be perforce accepted as a last resort is that in each district there should be a council of three Muslims, commanding the confidence of the Muslims of the district. The council should have at least one acknowledged religious scholar and it should decide cases in accordance with the Maliki code of law. The government should then be pressed to concede that in matters of Muslim mar-

riage and divorce, the decisions of the council will have the force of the court decisions and no appeal against them shall lie in any other court. Cases of Muslim marriage and divorce that come to law courts should also be transferred to the councils.²

Besides British India, in the Indian states too, (both Muslim and non-Muslim), the setting up of these councils should be the first step towards reform. Following the examples of the British government, even some states have abolished the courts of Qazis and replaced them with common civil courts, which have been empowered to hear even *Shari'ah* cases. These states must either revive the Qazis or should set up *Shari'ah* councils. Unless this legal structure is provided, it will be useless to present in the legislatures a bill for the enforcement of Islamic law and get it passed.

NEED FOR A MODERN LEGAL CODE

In addition to the arrangements for *Shari'ah* courts, what is also needed is the compilation of a manual containing mandates concerning the *Shari'ah* affairs of the Muslims. The mandates should be in the form of clauses with explanations. The manual should replace the so-called Muhammadan law in the *Shari'ah* courts and councils. When mixed courts were set up in Egypt need for such a code was felt, which could put together the necessary laws from authoritative sources. At the instance of the Egyptian government a committee of scholars from the Al-Azhar University under the chairmanship of Qadri Pasha accomplished this work. The code compiled by the com-

mittee was approved by the Egyptian government and was introduced into the courts.³

In India too, there is need for the appointment of such a committee. It should consist of selected religious scholars from each school of thought and some law experts. They should compile a detailed code with annotations. Its manuscript should first be circulated among the Ulama of various schools of thoughts and then be revised in the light of their reactions to it. On finalization, it should be declared to be the standard compendium of *Shari'ah* law in the light of which the *Shari'ah* affairs are to be settled in future. The so-called Muhammadan law resulting from the precedents set by British judges or judges devoid of knowledge and faith should be declared as void.

It may be asked as to why a new code be compiled when our books on jurisprudence have discussed all problems in detail. This is not just a possibility but a certainty that a section of people, because of their peculiar mentality, will oppose the suggestions. So we briefly state reasons which in our opinion make this task essential.

A cursory glance through the old books on jurisprudence will convince anyone that various problems have been discussed at random, in an outmoded style and sequence. They are couched in a language so obtuse and obsolete that the fine shades of its technicalities are often beyond the grasp of even those who teach these books. But now, the book publishing system is easier and more comprehensive. In such books, the laws are discussed clause by clause. Under

each clause one finds the explanation of important terms, clarification of objectives, details of the corollaries that follow it, precedents set by notable judges and interpretations by various experts. Moreover, the list of contents and indices facilitate the location of issues. No sensible man will deny that the compilation of modern books on Islamic jurisprudence must benefit from the advances made in the art of compilation and clarification as a result of continuous human endeavour. After all the ancient style of compilation was not based on the Divine command or the mandate of the Islamic law. It is not obligatory to adhere to it nor is it sinful to depart from it.

A more important reason than this is the fact that the mandates discussed in the old books on Islamic jurisprudence are predicated on general human situations. It is wrong to apply them off-hand word for word in every case. Their right application depends on the follow considerations:

The moral, cultural, social and economic conditions of the Islamic society, in which the law is going to be enforced, must be kept in mind. Their national habits, characteristics and customs as well as their environments and the effects of the environments should also be taken note of. We need also to note how strong or weak is the influence of Islam on their nature and their affairs and to what extent their Islamic characteristics have been changed by foreign influences; and as a result of general cultural conditions what changes have occurred in the legal aspect of their affairs.

Secondly, the individual circumstances of each particular case need scrutiny. The personalities of the

parties, their ages, education, physical health, their economic and social status, their previous history, family traditions, the general condition of the group to which they belong, are the factors that have to be weighed before forming an opinion as to how the law should be applied to them, in a particular aspect of the matter, so that the objective of law is realised and the principle of the law is established.

If someone finds an old book on Islamic jurisprudence and tracks down down the corollary of a law, then by blindly following the considerations listed above, he starts applying this corollary to each case that falls under it, he will be like a physician who has got the prescription of any illustrious Greek physician, but he deals with the prescription without taking into account the climate, the weather, the temperaments of the patients and the different stages of the disease. The medication prescribed by ancient physicians may be absolutely right and sound, but it was not meant to be handled by quacks. Its proper use requires knowledge, experience, intelligence and common sense. In the same manner the corollaries deduced by our great thinkers from the principles of *Shari'ah* and from the basic mandates are absolutely correct, but those great men could never have imagined that the results to their reflective thought were going to be used without comprehension and reasoning just as an ignorant post office person goes on mechanically stamping each letter with the same seal.

Islamic law was framed with such consummate wisdom that it was almost impossible for a man or a woman governed by this law to fall a prey to im-

morality and become a source of corruption for society. It was just impossible that the law should cause hardship that forces a man or a woman to flee out of the pale of Islam. But we witness today not only endless domestic disputes but also moral turpitude and even apostasy among Muslims only because in most cases people find it impossible to get a correct just decision under the Islamic law. Unfortunately, the Muftis as well as the judicial officers equally lack insight and reflective thinking. They care little for the country, the society and the nature of the particular case in which a general mandate is being enforced although the principle of *Shari'ah* demands that a general mandate needs to be particularised, according to the nature of the aforesaid factors. The Islamic law emphasises this point so that none of its principles is overlooked. As for the government officials, their handicap is self-evident. As for the religious scholars, all that they are capable of is to locate and quote various rulings from old books on Muslim jurisprudence, exactly as they find them written. Some of them have been granted by Allah breadth of vision and insight into the faith, but not a single one of them has the courage to examine critically an old corollary and alter even a word of it. This is because they are afraid of making an error on the one hand. There is the fear of being dubbed an innovator by the other Ulama, on the other. The only solution to this problem is that outstanding and influential Ulama of each state should jointly address themselves to the task and should compile a code for *Shari'ah* affairs suiting to the existing moral, cultural and economic conditions of the Indian Muslims. The code should be flexible enough to make necessary changes in its sub-clauses, to suit the particular fea-

tures of individual cases.

If someone brands this course of action as innovation, we must explain to him that he is in error. He should be made to see the difference between following the great leaders of thought and following the prophets. He does not understand the meaning of following a particular school of Islamic jurisprudence. To him following a particular school means to elevate this school to the status of faith, to raise its founder to the position of a prophet and to regard his rulings immutable like the verses of the Quran. To him it is an article of faith that the rulings of his school of jurisprudence need no correction, modification or addition; and it is a serious sin to subject them to research or criticism. It is his belief that it was permissible till the fourth century A.H. to feel free, while deciding cases, to ignore a corollary from another school of jurisprudence. But such course of action stands debarred now. Such blind following cannot be traced among the scholars of the past; nor is there any proof of it in the *Shari'ah*. The pupils of Imam Azam differed with their master on hundreds of problems and still they remained his followers. The later-day scholars of Hanafi jurisprudence made their choice from the conflicting views of Imam Azam and his pupils, preferring one view and rejecting the others and basing their verdicts on the view of their choice. Despite this research and criticism, no one can accuse them of innovation. From the fourth century of Hijrah to the eighth and ninth century, the Hanafi Ulama constantly amended, according to the needs of their times, the corollaries and precedents of the ancient scholars. Their independent judgement was never regarded as

innovation. No one has the courage to declare that Hanafi jurists like Abul Laith Samarqandi, the great Imam Sarkhasi, the author of *Hidaya*, Qazi Khan, the author of *Kanz*, Allama Shami and other scholars of their standing were innovators, just because they introduced flexibility into Hanafi jurisprudence, to cope with the circumstances and needs of their times. They based their verdict on the laws of other schools of jurisprudence, if they found the Hanafi jurisprudence harmful or impracticable. They made it a clause of Hanafi legal system that in case of need, it is permissible to base a verdict according to other schools of jurisprudence, provided this step is not taken for selfish ends.

It is true that if the people were free to follow other school of jurisprudence, just to suit their needs or if they took undue advantage of the concessions allowed by their own jurisprudence, there is the danger of using the law for selfish ends. Each school has allowed concessions from its own point of view to cope with special situations. If these concessions are exploited for personal gain, religion becomes a mockery and social life becomes chaotic. But if this step is taken by pious scholars of religion, in good faith, and by mutual consultation, to meet the current needs of Muslims, there is no fear of any harm, materially or spiritually. Even if these people unwittingly commit a mistake, the Quran declares them free from blame and worthy of Divine reward. The greatest hazard in this way is that a section of Ulama will start opposing it vehemently and their followers will develop ill-will against its pioneers. But a greater danger lies in avoiding this course of action. Hard pressed by their needs, Muslims will ignore Islamic law and will start following

their carnal lusts. Religion will become a mockery and Allah's limits will be openly infringed, leading to the spread, in an epidemic form, of moral turpitude, disbelief and sin. Like Christian nations, Muslims, too, will reject their religious code and adopt man-made laws. On the Day of Judgement, the religious leaders of these sinners will also be answerable to Allah, the Almighty. He will ask them, "Did We bless you with knowledge and wisdom that these gifts should not be used? Were you given the Book and the Sunnah of our Prophet that you should keep sitting over them and the Muslims should become lost in the darkness? We made the faith easy. What right did you have to complicate it? We commanded you to follow the Quran and Muhammad (peace be on him), who made it obligatory on you to place your forefathers above them? Our Quran embodied the solutions to all problems. Who told you not to touch the Quran and consider books written by men enough for yourselves?" It is too much to hope that in the face of this interrogation, books like *Kanz-ud-Daqaiq*, *Hidaya* and *Alamgiri* will be of any value to a religious scholar.

All these issues are necessary and important. Their detailed discussion being inevitable, this much space had to be given to them. We will now turn to the real topic of our discussion.

References

1. I want to re-emphasise the point that I do not believe in true worth of the *Shari'ah* bench set up by the orders of a non-Muslim government. But I am discussing here, the minimum feasibility of a procedure by which, till such time when an Islamic government is established, affairs involving the personal law of the Indian Muslims can at least be straightened out.
2. According to the Hanafis, the verdicts of these councils cannot be a sub-

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stitute of the judgement of the Qazi. But in case the councils are granted the power to enforce their verdicts and their powers do not end just at the hearing of cases as arbiters but extend to the authority of enforcement, then even for the Hanafis, their verdicts will be as good as the verdicts of the Qazis.

3. The code was rendered into French under the name "*Droit-Mussalman*". Besides Egypt it is also used in the court of other Muslim countries.

FUNDAMENTAL INSTRUCTIONS

Since the Holy Quran is a book dealing with all the fundamentals and principles of life, secondary problems relating to marital relations have not been discussed by it in detail. However, some broad principles have been stated which encompass almost all secondary problems and offer the best guidance for deducing corollaries. So before taking a look at the details of the law, it is necessary to understand fully the principles and rules laid down by the Quran. Consider the following verses:

1. "Do not marry idolatresses until they believe in Islam." (2: 221)
2. "Do not give believing women in marriage to idolators until they believe in Islam." (2: 221)
3. "Lawful for you are the chaste women from among those who have been given the Book." (5: 5)
4. "Do not marry idolatresses. Do not give your women in marriage to idolators." (2: 221)

These verses state the rule that a Muslim male cannot marry an idolatress. However, chaste women from among those who have been given the Book are lawful for him. But a Muslim woman can neither marry an idolator nor a man from among those who have been given the Book.

These verses also lay down the rulers that a man is free to seek the hand of a woman, but a woman is not absolutely free in this matter. To give her in marriage to someone is the business of her guardians. True, there is the ruling of the Holy Prophet (peace be on him) that a woman's consent is necessary for marriage to a man and no one has the right to give her in marriage against her will. But a woman's marriage is closely related to family interests, since the Quran wants that a woman's choice alone should not settle the affair; her guardians must also have a say in the matter.

"In return for the benefit you draw from them, give them their dower as an obligation." (4: 24)

"And how will you take back the dower you gave them, after you have enjoyed each other's companionship?" (4: 21)

"And if you divorce them before you touch them and the dower has been settled, you shall have to pay half of what has been settled." (2: 237)

These verses show that dower is in return for the benefit a man draws in the form of sexual intercourse. So it becomes payable after the first intercourse and cannot be nullified. Of course, the wife may, of her own free will, remit the whole or part of it. She may also give it up in return for *khula*.

"If you have given anyone of them a lot of money do not take back anything from it." (4: 20)

This verse indicates that Islamic *Shari'ah* places no limit on dower. No other law can place a limit on it.

"Men are the guardians for women. It is so because Allah has given them superiority over women and because they spend their money on them." (4: 34)

This verse makes living expenses the right of the wife. This money is in return for the conjugal rights the man has on her. This right of hers can in no case be nullified, unless she herself gives it up or she is guilty of desertion.

"And let him, who has abundance, spend out of his abundance; and whoever has limited means, let him spend out of what Allah has given him." (65: 7)

This verse lays down the rule for the assessment of living expenses. The financial position of the husband is to determine the amount of living expenses. A wealthy man will pay according to his means and a poor man according to his means.

"As for the women on whose part you fear rebellious behaviour, counsel them, and leave them alone in their beds; then give them a beating. So if they obey you, do not find excuses to be unjust to them." (4: 34)

This verse gives the husband the right to punish the wife, in case she starts disobeying him and rebelling against him. Even in this case, only two forms of punishment have been permitted. The first one is to cut off sexual relation. The second one is light physical beating, which is permissible only in cases of out-

rageous misbehaviour. If punishment exceeds limits, e.g., beating without outrageous behaviour or beating badly for moderate misbehaviour or going beyond light punishment even for outrageous behaviour, it will amount to cruelty on the part of the husband.

"And if you fear a breach between the two spouses, appoint an arbiter from his people and an arbiter from her people. If they both want improvement in relations, Allah will bring about harmony between them." (4: 35)

This verse lays down the rule that in case of a dispute between the spouses and their inability to arrive at a mutual compromise, let two arbiters be appointed, one to represent the man and the other one to represent the woman. The two of them should join hands and settle the dispute amicably.

The verse is addressed to people of authority among the Muslims. It is they who are to appoint the arbiters. And if the dispute cannot be settled by the arbiters, it is the responsibility of the authorities, as a last resort, to settle the dispute.

"Then if you fear that the two spouses will fail to keep within the limits of Allah, there is no blame on the two of them, if the woman gets separation in return for ransom." (2: 229)

The verse cautions the judge that in deciding marital disputes the crucial factor to guide him should be to see if both of them will be able to keep within the limits of Allah, relating to the discharge of conjugal

duties. If the probability is that these limits are going to be violated, then nothing can justify their union. The most important thing is the strict adherence to the limits set by Allah. No price is too high for the discharge of this duty. In the words of the Quran: "And whoso goes beyond the limits of Allah, he indeed wrongs his own soul." (65: 1)

"And do not retain them just to torment them, so that you do them injustice." (2: 237)

This verse warns men not to make the marriage tie a means of tormenting women and depriving them of their legitimate rights. The Islamic law wants the spouses to share a happy life. As long as a woman is retained, she must be retained in kindness and if the union becomes impossible to remain intact and there is the fear of torment or injustice for the wife, separation becomes essential. But it should come about in a decent manner. Islamic law abhors harm and permits no one to harm another person.

"And do not incline with total inclination to one wife, leaving the other one in suspense." (4: 129)

This verse lays down the general rule that a man with more than one wife should treat all wives equally. It will amount to injustice on his part if he totally disinclines from one of them. Depriving her of his own company and debarring her from marrying someone else, is a veritable torment for the poor woman.

"Those who swear not to touch their wives, the prescribed limit for them is four months." (2: 226)

This verse specifies maximum limit to which a woman can be left alone in bed. She can stand this much period of separation without feeling oppressed and without over-stepping the limits of Allah.¹ Beyond this period there is danger that either one of the afore-said things might happen. The verse was revealed to meet a particular situation, but it serves as a guide in all similar situations.

"Those who accuse their wives and have no witnesses except themselves, let the testimony of one of them be four testimonies, swearing by Allah that he speaks the truth. And a fifth testimony, invoking the curse of Allah if he be a liar." (6, 7: 24)

This verse deals with the case of a man who accuses his own wife of adultery but has no witnesses. He must declare on oath, four times that the accusation is true. He shall have to declare on oath, the fifth time that Allah's curse may fall on him, if the accusation be false. The solemn statement of the husband renders the wife liable to punishment, which can be averted only if she declares four times on oath, that the accusation is false and also makes the fifth declaration on oath, that the wrath of Allah be upon her if the man has spoken the truth. If both spouses make these solemn declarations, the court has to separate them.

"Unless they (the women) agree to forgo it (dower), or he agrees to forgo it in whose hand is the marriage tie." (2: 237)

This verse unequivocally declares that the marriage tie is in the hands of the husband. It is he who

To check the practice of apostasy the Indian Ulama want to follow the ruling of the Ulama of Balkh, Samarqand and some other Ulama of Bokhara. Their ruling is that apostasy does not dissolve the marriage tie; the woman remains the wife of the man despite her apostasy. The ruling is based on the fact that apostasy is being resorted to only as a device to get rid of the marriage tie. The only way to counter this trick is to let the marriage tie remain unaffected by apostasy. However, the acceptance of this ruling is going to create problems which have not probably been foreseen by our Ulama.

The first difficulty is that in the eyes of the law of the land, as well as the *Shari'ah* law, a person is a Muslim or non-Muslim on the basis of verbal profession. There is no way of proving that a woman is actually a Muslim at heart but she is feigning apostasy in order to be separated from her husband.

Secondly, if a woman leaves Islam to become a Christian or a Jewess, her marriage tie, according to the Quran, stays intact. But if she accepts the Hindu, Sikh or the Parsi faith or some other faith, it will be against the clear mandate of the Quran to retain the marriage tie.

Thirdly, how are you going to apply Islamic law to a woman, who has left the fold of Islam to embrace another faith? Indian Muslims live under a non-Muslim government, which gives equal treatment to the Muslims, the Hindus and the Sikhs. If a woman goes over to the Sikh faith or the Arya Samaj, how can we expect the government to force the woman, against

COROLLARIES

The fundamental principles of the Islamic marital law have been discussed in the previous chapter. Important corollaries following from these principles are now being taken up in the same order. No attempt will be made to encompass all corollaries. Attention is being focussed only on the peculiar problems that need the restatement and elucidation of the mandates of the *Shari'ah*, in the light of the needs and circumstances of present times.

1. APOSTASY OF ONE OF THE SPOUSES

In modern times apostasy has assumed a special importance. The apostasy of the husband makes no actual problem because there is general agreement on the fact that the bond of marriage cannot tie a Muslim woman to a non-Muslim husband. But difficulty arises when a wife turns an apostate. Mostly women have turned to apostasy and are still turning to it on the pretext of releasing themselves from husbands who are cruel or whom they dislike. In such cases the courts set up by the British follow the ruling of Imam Abu Hanifah as quoted in *Hidaya* and other books. The ruling states that the apostasy of either one of the spouses automatically separates the two of them, without a divorce.

"And if he divorces her the third time, she is not lawful to him thereafter until she has wedded another husband." (2: 230)

These verses explain the right mode of divorcing a woman. The three pronouncements of divorce have to be spaced, as described earlier. The first two pronouncements are provisional, leaving the option of mending and resuming conjugal relations. The third pronouncement irrevocably breaks the marriage tie.

References

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- ¹ It was on the basis of this principle that Hazrat Omar issued orders that no married soldier should be kept away from home on military duty, for more than four months.

can retain it or break it. Wherever the Quran speaks of divorce, it ascribes the act to the man. This is a conclusive proof that it is the husband who has been given full power to divorce the wife or to retain her. No law can be enacted to divest the husband of this power.

But in Islam all powers are subject to the universal condition that they have to be exercised with the fullest regard for fair play and within the limits of Allah. "He who violates the limits of Allah, wrongs his own souls," is the ever-present warning for the husband. In fact this Divine warning overshadows the entire legal system of Islam. The power granted to the husband is no exception to this all-pervading principle. If a woman feels aggrieved, the Quran tells her to refer her case to Allah and His Messenger, i.e., the court of law. If her complaint is proved valid, the court will take away the man's power, as provided by the Islamic law, and use it to separate the spouses.

A section of jurists argues that the right of divorce granted to the husband by the Quran is absolute and free from all restraint. If the husband is unwilling to divorce, the court has no authority to strip him of the power and use the power itself on his behalf. The Quran, however, does not lend support to this view. According to the Book of Allah, even man's right to life is subject to the will of the Lord of Truth. How can the Quran arm the husband with a power that remains unchallenged even though it is maliciously used to trample all the rights of the wife and to flagrantly violate the limits of Allah?

"Divorce must be pronounced twice and then the woman must either be retained in honour or allowed to depart in kindness." (2: 229)

her will, to retain the marriage tie that was solemnized under Islamic law when she was a Muslim?

These reasons force us to conclude that Indian Ulama can draw no benefit from the rulings of the Ulama of Balkh and Samarqand. The thing that should engage our attention is what drives married women out of the fold of Islam. It can be stated with certainty that no more than two to four percent of the women leave Islam because of a change in their beliefs. And they are driven to apostasy because they find no legal remedy for the oppression and tyranny to which they are subjected by their husbands. The husband may indulge in the worst kind of cruelty but the wife is unable to get a *khula*. The husband may be worthless, he may be afflicted with a dangerous or loathesome disease, he may be a slave to wayward habits, but the wife cannot leave him. These factors make the wife hate his very name and might bring about a total break down of mutual relations. Despite all this the wife finds no way of ridding herself of the marriage bond. Or maybe, the whereabouts of the husband have not been known for years which has made life of the wife intolerably miserable. But she can see no way out of this calamity. Circumstances like this force women to step out of the bond of Islam and seek a sanctuary in disbelief. Searching out legal corollaries to block the path of these unfortunate women from falling into disbelief, is also not a right remedy. This step would rather drive the women to commit suicide. The right course is that we take a critical look at the *Shari'ah* law and amend it, in the light of modern needs and circumstances. The legal hurdle that forces our sisters and daughters to forsake Islam and go into

disbelief, can thus be done away with. The authentic mandates of Allah and His Messenger have not laid down any constraint that may cause harm and injury to anyone, let alone drive anyone to apostasy. This shortcoming exists only in some of the rulings of the jurists. Such rulings can be replaced by other rulings that can effectively check the apostasy of Muslim women.

2. DISCRETION OF ADULTHOOD

The Quran lays down the rule that the guardian of a woman must have a say in the matter of her marriage. This mandate, as interpreted by the Messenger of Allah's word and his practice, makes it clear that it does not seek to give the woman no say in deciding this vital affair of her life. On the contrary, the Holy Prophet (peace be on him) made the consent of the woman an indispensable condition of marriage. Collections of Hadith compiled by Abu Dawood, Nasa'i, Ibn-e-Majah and Imam Ahmad report the case of a girl who approached the Messenger of Allah with the complaint that her father had married her against her will. His reply was that she had the option of accepting or rejecting her father's choice. Nasa'i reports the case of Khansa, the daughter of Khaddam. She, too, made the same complaint to the Messenger of Allah and received the same reply. Qutni narrates a report from Hazrat Jabir that the Holy Prophet separated a couple because the girl had been married against her will. Nasa'i also narrates a report from Hazrat Ayesha saying "A woman came to the Holy Prophet (peace be on him) complaining that her father had married her to his nephew against her will. He told her that she

was free to accept or reject her father's choice. At this she exclaimed Messenger of Allah, I accept my father's choice. I just wanted to make it known to other women that their fathers did not have the final say in this matter."

Collections of Hadith compiled by Muslim, Abu Dawood, Tirmizi, Nasa'i and Imam Ahmad all quote the rulings of the Holy Prophet (peace be on him), which say that a woman who has already had a husband, has a greater right than her guardian to decide about her marriage. But a virgin woman's consent must be obtained. Abu Hurairah reports from the Messenger of Allah:

"A woman who has had a husband before, should not be married without her permission and a virgin should not be married without her consent."

3. OBLIGATORY GUARDIANSHIP

All the precedents cited above show that one of the principles of the *Shari'ah* law is that the consent of a woman is an indispensable condition for marriage. The application of this principle poses a question in the marriage of a minor girl who is incapable of giving her consent. Is she going to lose her right to exercise consent, if her father has given her away in marriage? The ruling given by the jurists is that if a minor girl is given away in marriage by someone other than the father or the grandfather, she shall have the right, on attaining adulthood, to accept or reject the marriage tie. In case she was given away by her father or grandfather, she shall have no such right, except when

the father or grandfather is known for leading a life of immodesty, and reckless behaviour. The ruling that a minor girl is living under the inexorable will of the father or the grandfather and has no right, on attaining adulthood, to disapprove of the marriage tie, solemnized by her father, has no support from the Quran or from any Hadith. Its only basis is the argument of the jurists that the father and the grandfather can have no ill-will against the girl; so the marriage solemnized by them should be binding on her.

The ruling given in *Hidaya* is:

They (the spouses married in infancy) have no discretion of approval after attaining adulthood because they (the father or grandfather) have mature judgement and great affection. So the marriage tie will be binding for their marital relations, as if they had consented to it on attaining adulthood.

This view is entirely based on conjecture and lacks the authority of the mandates of Allah and His Messenger. Moreover, it is open to all kinds of objections.

1. A confirmed Hadith of the Holy Prophet (peace be on him) states that he married the minor daughter of Hazrat Hamzah to Amar bin Abi Salma and said that she had the discretion to accept or reject the marriage on attaining adulthood. This clearly establishes the right of minor spouses to exercise discretion on attaining adulthood. No comment was made by the Holy Prophet (peace be on him) to the effect that since he was not the girl's father but only her cousin, the marriage was not binding on her.

2. Islam does not give the father or the grandfather a final say in the marriage of a woman. The final say belongs to woman herself. She cannot be married to anyone without her free consent. It is really surprising that a minor girl should be deprived of this precious right. A woman has been given the right to assert her discretion because marriage is a matter intimately related to her life-long happiness. Looked at from this point of view, a minor girl stands as much in need of this right as a grown up woman. If maturity of judgement and great affection can entitle the father or grandfather to overrule the discretion of a minor girl, the discretion of a grown up daughter can also be overruled on the same ground.
3. The maturity of judgement and depth of affection ascribed to the father and the grandfather are only an act of empiricism, not a universal law. There is no dearth of exceptions where there is little affection and still less maturity.
4. Even in cases where the father and grandfather are men of insight and have deep affection for the minor girl, it may well be that their expectations do not come true. The boy may grow up into a young man contrary to their expectations. This is all the more likely in these days of galloping social changes sweeping across the globe. Age-old concepts and practices that had been sacrosanct for generations are being brushed aside as symbols of backwardness. In such circumstances the course of prudence is to discourage child marriage, as far as possible. An irrevocable tie is likely to become an

acute problem in future for the father or the grandfather who arranged the marriage.

5. In case the father or grandfather giving the minor girl in marriage is evil-living, immodest and reckless, the girl on attaining adulthood, though she gets the right of exercising her discretion, will have to prove in the court the moral blemishes that disqualify the father or the grandfather. This will be too embarrassing a task for her to undertake.

The above factors make it imperative that this ruling of the *Shari'ah* law should be revised. Public interest demands that it should be so amended that the minor spouses (the girl as well as the boy) get the right of exercising their discretion on attaining adulthood.

4. CONDITIONS FOR THE EXERCISE OF DISCRETION

Another ruling of the jurists on this issue also demands a critical look. In case minor girl is given away in marriage by someone other than the father or the grandfather, she has the option to exercise discretion on attaining adulthood. But the condition is that she should declare her disapproval immediately on the beginning of the first sign of puberty. If she does not declare disapproval on the first discharge of the menstrual course, she shall lose the right of discretion. The amazing thing is that this condition applies only to a virgin. The ruling for a girl touched by a man and for a minor boy is that as long as they do not declare their consent they shall have the discretion to dissolve the marriage tie.

The condition laid down for the minor virgin finds no support from the Quran or the Hadith. This is a judicial ruling and needs amendment. The discretion to dissolve the marriage has been conditioned by the beginning of puberty only because puberty brings in its wake maturity and the ability to distinguish between good and bad. Mature judgement enables one to act with responsibility. This does not imply, however, that the first sign of puberty brings about an instant mental revolution, making the individual capable of independent judgement. Even if such a sudden change does come about, why is the minor virgin placed on a footing different from that of the minor boy and a minor girl touched by a man? The latter two have been granted the discretion, after attaining adulthood to dissolve marriage as long as they have not expressed their consent to it. On what grounds, after all, has the minor virgin been denied sufficient time to make up her mind after careful thought? An inexperienced virgin certainly needs more time to think and weigh things than does a young man and a young girl of her age, who has been touched by a man. The minor virgin is much more inexperienced and immature than these two.

5. DOWER

As for the amount of dower no limit has been set on it by any mandate of Allah and His Messenger. Hazrat Omar once planned to set a limit. Learning of this, a woman came to him and cited the Quranic verse "Even if you have given one of the women a huge amount of dower, do not take back anything."

Hearing this Hazrat Omar exclaimed:

"The woman was correct and the man mistaken."

No legal limit can be imposed on dower. However, the verdict of the above saying is that it is undesirable to fix a dower which is beyond the means of the husband. The advice given in this matter by the Holy Prophet was:

"Try to enable men to pull on with women. Do not get beyond limits in fixing the dower."

Abu Amr al-Aslami married a woman for a dower of two hundred pieces of silver. The Holy Prophet remarked:

"Even if you were to find silver pieces washed down by brooks and streams, you would not have fixed a dower higher than this." Anas married a woman for one hundred and sixty silver pieces. The Messenger of Allah remarked: "It seems you are digging silver out of this mountain."

Hazrat Omar summed up his views on the issue thus: "Do not exceed the limits in fixing dower. Had this been something conferring merit in this world or in the Hereafter, the Messenger of Allah must have outdone all of you. But the dower of none of his wives and daughters exceeded four hundred and eighty silver pieces."

These comments shed light on the undesirability of fixing excessively high dower. But the current practice in our country is far more deplorable. Deeds

specifying hundreds of thousands of rupees as deferred dower, are drawn up. But neither is the payment of these sums within the means of those making the commitment, nor does the intention of payment ever cross their minds. This sorry state of affairs is not only disgusting but also corrupting. The ruling of the Holy Prophet in this matter is:

"A man, who marries a woman in return for an amount of money, but has the intention of never paying it, is in reality an adulterer. One, who borrows money with the intention not to pay it back, is in reality a thief.

This is the spiritual demerit of high dower. The material demerit is in no way less serious. The purpose of a huge amount of dower is to debar the husband from divorcing the woman. But on the contrary, in case the spouses cannot pull on together, the unusually heavy rate of dower becomes a millstone round the woman's neck. Inability to pay a huge amount deters the man to divorce her and she remains suspended for years, may be for the whole of her life. Excessive dower is one of the factors which is causing hardship to our women. If the dower is kept within reasonable limits, a large number of the marital problems will not get bad to worse.

The existing situation can be solved without contravening the *Shari'ah* laws. If the dower is made immediately payable, the parties may be at liberty to fix any amount they please. In case the dower is deferred, the deed for its payment should be drawn up on a regular stamp paper, bearing stamps for at least fifty

percent of the amount of the dower. A marriage deed which does not fulfil these requirements should not be legally admissible. Such a law, if enforced, will easily put an end to the rotten type of deferred dower prevalent now-a-days. This law will force people to fix dower according to their means. It will also compel them to stop wasting money on stupid customs and pay the dower at the time of marriage, either in cash or in the form of property. When healthy traditions have struck firm roots, the legal requirement can be done away with.

6. LIVING EXPENSES

Disputes arising on this count can be of two kind:

- i. The husband can afford to pay living expenses but does not pay.
- ii. He simply cannot afford to pay.

For defaulter of the first type, there is general agreement that the court should take all possible measures to force him to pay. There is a difference of opinion as to what should be done if the man fails to comply with the orders of the court. The Hanafi view is that nothing can be done in the matter. It is for the woman to think of the ways of meeting her living expenses. She may borrow on the security of her husband; she may take up work and earn a living; or she may get help from her relatives. The Maliki view is that in such a case the court has the right to separate the spouses, by pronouncing a divorce. Some of the Hanafi jurists have approved of the Maliki ruling, with the proviso that the woman be incapable of fending for

herself or even if she is capable, there lies the danger of her overstepping the limits of Allah. But evidently this proviso seems to be out of place. The Quran has granted the wife living expenses as a matter of right. It is in return for this right of hers that the husband gets the conjugal rights on her. When the husband is deliberately denying her this basic legal right there is no reason why she should be forced to stay bound by the marriage tie. If someone gets a commodity and gives nothing in return or receives goods and refuses to pay the price, how can he claim possession of that commodity or those goods? As long as a woman is bound in the marriage tie, her husband is responsible for her maintenance. What rule of justice can require her to earn her own living or to become a burden on her relatives or to borrow in the name of a cruel husband.

In the second case, too, the Hanafi ruling is that the woman should be advised to put up with the situation with patience and self-restraint; and to borrow or seek help from the relatives. The ruling of Imam Azam is that her living expenses have to be borne by the person, who must have been responsible for her maintenance, in case she had stayed unmarried. However, the ruling of Imam Malik, Imam Shafi'i and Imam Ahmad bin Hanbal is that if the woman cannot pull on with the husband and asks the court for separation, she ought to be separated. Imam Malik recommends one or two months notice to the husband, Imam Shafi'i thinks that a notice of three days is enough, whereas Imam Ahmed favours immediate separation.

The Quranic verse granting the husband conjugal rights in return for the money he spends supports the

position taken by the last three imams. The Hadith and other evidence are also on their side. Qutni and Baihaqi quote the decision of the Holy Prophet (peace be on him) that in case of non-payment of living expenses, the spouses should be separated. The same ruling was given by Hazrat Ali, Hazrat Omar and Hazrat Abu Hurairah. Among the later-day authorities, Saeed bin Museb and Omar bin Abdul Aziz also acted on this precedent.

On the other hand the Hanafi argument is based on the Quranic verse: "He whose provision is limited, let him spend of that which Allah has given him. Allah asks naught of any soul except that which He has given it." (65: 7)

The implication of this verse is that no specified amount can be fixed for living expenses. The amount depends on the means of the husband. But it does not mean that in case the husband is absolutely without means, the wife should be forced to suffer miserable life with him. It would indeed be a heroic deed if she could do it and Islam expects its daughters to develop such rare quality. Women of good breeding do rise to such moral heights. All the same, morality is one thing and a legal right is another thing. Maintenance is the legal right of the wife. If she willingly forgoes it, and enjoys her husband's company even without it, it is highly laudable. But if she does not want to forsake it, or is unable to do so, there is no provision in the Islamic law that can force her to be content with her miserable lot as an act of heroism.

The foregoing discussion points to the conclusion that the best solution to the problem is the one sug-

gested by Imam Malik, viz., separation between the spouses after a reasonable notice to the husband.

7. UNDUE OPPRESSION

"As for those from whom you fear rebellion, admonish them and leave them alone in their beds and give them a beating. Then if they obey you, seek not a way against them." (4: 34)

This verse does not give the husband the right to be harsh on the wife, either verbally or physically without a genuine cause. In case he does this, the woman is entitled to legal protection. No precedent, however, can be cited to explain the details of procedure in such a case. But the Islamic law is humane enough to permit the court to provide relief to the aggrieved woman, in unbearable cases, by separation between the spouses. In some sections of our society ill-treatment of the wife seems to have become a common practice. Being a husband is looked upon as a licence to inflict unbridled injury and injustice. There seems to be a need to include in the Islamic law suitable clauses to check this cruel practice. The best that can be done is to include the habitual use of filthy language and the frequent resort to beating among the legitimate grounds for demanding *khula*. Women who can prove such treatment on the part of the husbands should be granted separation without making any payment.

8. ARBITRATION

"Appoint an arbiter from among his people and an arbiter from among her people." Where differences between the spouses become a threat to the marriage tie,

the above verse of the Quran provides the right solution. That is what Hazrat Ali did. A case is reported in *Kashf-ul-Ghumma*. A man and his wife, who were on very bad terms, came to Hazrat Ali. He told each of them to choose an arbiter. This done, he summoned the two arbiters and said: "If you feel that union between the two of them is the right thing, keep them united. But if you feel their separation is the right thing, separate them."

Then turning to the woman Hazrat Ali said: "Will you accept the verdict of the arbiters"? Her reply was: "Yes, I will." When the same question was put to the man, he replied: "If they retain the union I will accept the verdict. If they separate, I will not accept."

At this Hazrat Ali gave his verdict: "You do not have such a right. You shall not leave unless you promise to accept the verdict of the arbiters, as the woman has promised."

Such arbitration is a suitable device for settling family disputes, which do not involve complicated legal issues. To make arbitration still more serviceable, it is necessary to add a few more clauses to the law. The clauses should clarify the procedure of arbitration, the powers of the arbiters, the mode of the enforcement of their agreed decision, and the course of action, if the arbiters disagree. The attempt of the Islamic law to settle most of the family squabbles at home, instead of dragging them into the court, is very precious feature of this law. Even when a case reaches a court, the judge is required, before making a probable himself, to get help from the responsible members of the two parties for solving this problem. This, too, is a blessing for social life.

9. OPTION OF DISSOLUTION FOR SERIOUS DISABILITY

Great differences exist between jurists on the question of the dissolution of the marriage when one of the spouses discovers after marriage that the other spouse is suffering from a serious disease or loathesome physical defect. A section of jurists is of the view that neither of the spouses has the option of dissolving the marriage on the ground of a handicap or a shortcoming of the other spouse. The ruling given in the *Durr-e-Mukhtar* is: Neither the husband nor the wife has the right to get the marriage dissolved on account of the handicap of the other, however serious the handicap may be, like madness, leprosy, leukoderma, hernia, etc. This view has been held by Hazrat Ali and Ibn-e-Masood from among the companions and by Ata Nakhai, Omar bin Abdul Aziz, Ibn Abi Laila, Auzai, Thauri, Abu Hanifah and Abu Yusuf.

The other section of jurists holds the view that handicaps which are a barrier to conjugal relations give both spouses the right of dissolving the marriage. The handicaps listed are madness, leprosy, leukoderma, foul-smelling mouth, venereal diseases. Imam Malik is the propounder of this view. In his book *Al-Qawanin*, Abu Ejaz lists these handicaps and states that if either one of the spouses has any of these handicaps the other spouse has the option to live together or to separate.

According to Imam Shafi'i both spouses have the right of dissolving marriage, in case one of them is suffering from madness, leprosy or leukoderma. But

venereal disease, foul-smelling mouth and itch are no grounds for the option of dissolution. But if the woman has a sexual disease that rules out intercourse or the man is impotent or he is a eunuch, the deprived spouse has the option of dissolution.

According to Imam Muhammad, no handicap of the woman gives the husband the option of dissolution; but his madness, leprosy, and leukoderma give option to the woman.

Of all these views, the second one is closest to the teachings of the Quran. In the eyes of the Quran, the two most important objectives of the marital relationship are the preservation of chastity and the bond of love and compassion between the spouses. These objectives get lost if either one of the spouses is afflicted with a disease or a handicap, which disgusts the other or renders him or her incapable of satisfying the natural urge of the other. Another principle of Islamic marital law is that the marriage tie should not be a source of causing harm to the spouses or a cause of forcing them to transgress Allah's limits. If there is no option for dissolution on the ground of the above mentioned afflictions, this principle is certain to be violated. The aforesaid disease and handicaps certainly cause harm to the normal spouse. And there is also the ever-present danger that hatred or the lack of sexual drive may prompt the normal spouse to violate Allah's limits. Thus it appears necessary that these afflictions should give the spouses the option to dissolve the marriage.

The discussion has thus far been restricted to cases where the spouses did not fully know each

other's personal conditions before marriage and they expressed their disgust as soon as the true picture of the other spouse became known. But there can also be cases where the spouses fully knew each other before marriage and they knowingly entered into the marriage tie. It could also be that they were not aware of the defects before marriage. But when they came to know of it, they did not use the option to dissolve marriage. Another possibility is that of the disease or the handicap developed after the marriage. In all these cases the man has an alternative. He can divorce. Another alternative for him is to have second wife. But in certain cases, the jurists have suggested no remedy for the woman. Some jurists have in some cases devised a way out for the woman but others have not approved of it. The rulings given on this issue will be taken up and discussed one by one.

10. IMPOTENCY

All agree that if the husband's private part has been amputated, the woman has the right to ask the court to separate her and, if the fact is established, separation shall be made forthwith.

If the husband is impotent and the woman demands separation, the husband, according to the precedent set by Hazrat Omar, will be given a year's time for medical treatment. If he is still impotent, separation will be made. However, jurists have laid following conditions:

- i. This ruling is applicable only in cases where the woman was unaware of the man's impotency at

the time of marriage. If she was aware and still willingly married the man she cannot demand separation.

- ii. In case she was unaware beforehand and discovered the fact afterwards, but still declared her consent to retain the marriage tie, she loses her right to demand separation.
- iii. Separation will be effected only if the man has not had a sexual intercourse even once. If there has been even a single intercourse, and that too an unsatisfactory one, the woman loses the right of separation.

These conditions find no support from the Quran or the Hadith and they are unjustified. If a woman is foolish enough to marry a man whom she knows to be impotent, it is both unfair and unreasonable that she should be irrevocably condemned to share life with him. The evils stemming from such a union are too evident to be discussed. It will be enough punishment for her if she is separated and deprived of the dower.

If a woman comes to know of her husband's impotency after marriage and she initially consents to live with him, she has committed no serious crime for which she should be forced to spend the rest of her life in misery. An inexperienced virgin at the threshold of married life, can hardly imagine what hardships await her in her union with an impotent husband. Maybe because of her good nature, she takes a light view of the matter and thinks she will be able to carry on any way. But, if later she comes across hardships, too for-

midable to bear and perplexed with the fear of ill-health or slipping into sin, she demands separation, how is it permissible to snub her and tell her either to pine away the rest of her days or to compromise with sin? The more you think the more strongly you feel that hurling a woman into such a situation is diametrically opposed to the teachings of the Quran. The situation can explode into more harmful scenario that will not be restricted to the individual person of the woman, but will also infect the whole society and the infection will be transmitted to coming generations. Rather than running such a grave risk, it is far better to take a humane view of the mistake made by a woman. Separation will do her no harm. If at all she is to be punished, let her lose the whole or part of the dower. As a matter of fact even this punishment will be unfair. More deserving of punishment is the man who married a woman despite his impotency.

The third condition is also very harsh. This type of conjugal relationship does not measure up to the Islamic objective of marriage. Islamic law has not been designed for heavenly beings but for the humanity. It is extremely difficult, if not impossible, for an average woman to have only one or two or few intercoursess throughout life and feel happy and satisfied, keeping her chastity intact. Even if it is assumed that fifty percent of the women can rise up to this standard, what will happen to the remaining per cent, who do not come up to a very high level of patience, self-restraint, morality and chastity? Will the responsibility of their licentious living not rest on the law that closed for them the lawful way, pushing them into a life of sin and corruption? The inevitable conclusion from these

stark facts seems to be that in every case of impotency, whether it existed before marriage or developed later, the woman should have the right to go to the court. If after a reasonably long medical treatment, the maximum limit for which should be a year, the defect persists, separation must be made.

The view of the jurists is that if, after the year-long treatment, the man is able to have intercourse, even partially, the woman loses the right to separation for good. This view again is unduly harsh. The correct course of action will be to rely on medical opinion. If the expert opinion is that medical treatment has failed to restore his potency enough to fully discharge his conjugal rights, separation must be made.

The jurists have placed the castrated and the impotent in the same category and have allowed the former a year for medical treatment. The reason given is that there is hope of his developing ability for intercourse. But it has been proved by medical research that there is no difference between the castrated and the man whose private parts have been amputated. A man's private parts may have been cut off or his testicles may have been destroyed; in both cases he is equally unfit for sexual intercourse. No medical treatment can restore potency to such handicapped males. The castrated belongs to the category of the amputated private parts, not the impotent.

ii. MADNESS

The ruling given by Hazrat Omar is that a year's time should be allowed for the medical treatment of

the mad man. If treatment fails to cure him in a year, the wife should be separated. The ruling has been accepted by jurists, with the addition of sub-clauses:

Imam Abu Hanifah's view is that this ruling applies to the man who was mad before marriage and was unable to have an intercourse after marriage. In this respect he is as good as impotent. That is why he gets a year for medical treatment.

According to Imam Muhammad, if madness is fitful, a year's medical treatment will be allowed. But if it is perennial, the fellow is as good as the man without private parts requiring immediate separation.

Imam Malik is of the view that the medical treatment of madness, whether fitful or perennial, should get a year, if there is no cure at the year's end, separation should be made. Maliki jurists have added conditions:

- i. If the man was mad before marriage and the woman knowingly married him, she cannot demand separation.
- ii. If she gets to know of his madness after marriage and declares her consent to live with him, she cannot demand separation.
- iii. In case madness afflicted the man after marriage, the woman can demand separation only if she did not declare her consent to live with him, nor allowed him, of her own free will, to have intercourse with her.

These conditions are of the same nature as the conditions discussed in impotency. They find no support from the Quran and Sunnah and are open to serious objections. If a woman is kept forcibly tied to a mad man, the objectives of the *Shari'ah*, the civilization and morality can never be realized. If she knowingly married him, relinquishing the dower is enough punishment for her. If she came to know of his madness after marriage and consented to live with him, but later the resultant physical and mental agony became unbearable, she committed no crime for which she should be condemned to life-long union with a mad man, exposed to sorrow, misery and great hazards. In case the man was afflicted with madness after marriage and the wife, out of loyalty and noble feelings of fellowship, did not abruptly leave him but chose to look after him and share life with him, this should not be made a ground for denying freedom to her when the madness of the man becomes unbearable for her. Such a ruling can only put an end to all humane feelings between the spouses. The intention of the law will seem to be that the moment a woman notices symptoms of madness in her husband she should forthwith forget all previous love and compassion and curtly leave the husband to his fate, knowing full well that if the madness assumes an intolerably perennial form, the feelings of loyalty and fellowship now welling up in her heart will ultimately spell disaster to her putting her to untold agony.

The imposition of such conditions projects an exaggerated image of the man and metes out a harsh treatment to the woman. If a woman becomes good for nothing, becomes mad or contracts a loathesome or dan-

gerous disease, the man can divorce her. Or he can marry a second wife and lead a happy life. But if the husband becomes afflicted with any of these handicaps the woman can neither divorce him nor marry another man during his lifetime. Separation is the only remedy for her. When this sole remedy is hedged round with restraints which, in most cases, leave no way out for her, it offends the justice and balance that are characteristics of the Islamic law. In all such cases the guiding light for us should be the Quranic verses which assert that marriage should be a relationship of kindness. The bond of marriage should be free from insulting behaviour and excesses which threaten the violation of the limits of Allah. A marriage bond that is devoid of these characteristics should end in decent separation. Who can say that anything can cause a greater harm and injustice to a woman than to forcibly keeping tied down, against her will, to a man afflicted with madness, venereal disease or leprosy? Is there anyone who does not realize what evil temptations surround a woman forcibly pushed into such desperation and how hard it is for an average woman to spurn these temptations?

12. THE MISSING HUSBAND

There is no definite mandate in the Holy Quran regarding a missing husband, about whom nothing is known. Qutni has reported a Hadith:

"The Messenger of Allah said: 'The wife of the man who is missing and about whom nothing is known remains the wife of that man till facts about him have come to light.'"

The Hadith has been reported by Siwar bin Musab and Muhammad bin Shurjail Hamdani, both of whom are not very reliable.

Ibn-e-Abi Hatim's comment about Shurjail is: He reports from Mughira things that are unreliable and false. Ibn-ul-Quttan's remarks about Siwar are: He is even more unreliable than Ibn-e-Shurjail. Thus this Hadith is not to be relied upon. Moreover, the divergent views held on this issue by notable luminaries like Hazrat Omar, Hazrat Usman, Hazrat Ali, Ibn-e-Abbas, Abdullah bin Masood and Abdullah bin Omar are further evidence that neither they nor any other companions had any knowledge of the above quoted Hadith. Had any of the companions known the ruling of the Holy Prophet (peace be on him) on this issue, he must have come forward to clarify the difference of opinion. Shurjail has reported this Hadith from Mughira bin Shuba, who was a well-known figure in the days of Hazrat Omar and Hazrat Usman and occupied the high office of a governor. If Mughira had known this Hadith, how would he have allowed Hazrat Omar and Hazrat Usman to decide cases contrary to this Hadith? This solves the point that there is no mandatory law on this issue. Scholars have to be guided by their best judgement to decide the case about a missing husband.

Differences exist on this issue in the opinions of the companions, their successors and the leading jurists. In the opinion of Hazrat Omar, Hazrat Usman, Ibn-e-Omar and Ibn-e-Abbas, the wife of the missing husband must wait for four years. The same view has found favour with Saied Ibn-e-Musayyab, Zuhrie,

Nakha'i, Ata, Makhool, and Shaabi. Imam Malik also adopted the same view. Imam Ahmad also leans towards this view.

On the other hand, Hazrat Ali and Ibn-e-Masood are of the view that the wife of the missing husband must wait until he is found or his death is confirmed. This view has been adopted by Sufyan Sori, Imam Abu Hanifah and Imam Shafi'i. Concerning the period of waiting, Hanafi jurists suggest that the wife of the missing man should wait till the other men of his age living in the community are alive. Some have fixed the period of waiting making the maximum age expectancy as their yardstick. For example, if a man was missing when he was thirty, his wife should wait, according to some for 90 years, according to others 70 years, according to still others 60 and according to some others 50 years and according to the most considerate 40 years. The difference in the length of period is the result of the difference in the life expectancy of man assumed by different jurists. So if the woman was 20 when the man disappeared, according to the most lenient view, she will have to wait till she is 60. She will then be free to marry a man of her choice.

After taking a look at the matter in the light of the Quranic principles we feel that the view adopted by Hazrat Omar and his followers sounds correct. It is in keeping with the spirit and the nature of the Islamic law as well as with its concern for justice and balance. Take for example the permission to marry four wives. It is also accompanied by the warning: "Do not totally lean to one of them, leaving the rest suspended." The warning highlights the Quran's abhorrence of leaving

a woman suspended. When such is the case in the existence of the husband, how can the Quran approve of keeping a woman suspended indefinitely, when the husband is missing? Discussing the case of women left alone in their beds as punishment, the Quran puts the maximum limit at four months. Beyond this limit, divorce becomes a necessity. This mandate underlines the fact that Islamic law does not approve of depriving a woman of sex to the extent that causes her harm or drives her to transgress Allah's limits. Another Quranic mandate warns: "Do not retain them to cause them harm." The clear implication is that marriage should not become a source of affront and injury. If the wife of the missing husband has to wait for the rest of her life, the harms inflicted on her can well be imagined. In this background take a look at the mandate: "If there is a danger that Allah's limits will be transgressed there is no harm if they separate." This amounts to observing Allah's limits above the retention of the marriage tie. Who can deny that a woman, whose husband has been missing, will find it increasingly hard to stay within the limits of Allah? Having a sharp glance at these mandates and their implications for the social good, one can easily understand that it is wrong to keep the wife of a missing husband in suspense for an indefinite period.

13. MALIKI RULINGS ABOUT THE MISSING HUSBAND

The foregoing discussion explains why Hanafi jurists have preferred to follow Maliki rulings in their verdicts on cases of missing husbands. Let us take a look at the details of Maliki ruling.

Malilki jurists have divided these cases into three categories, with different rulings for each:

- . In case the missing husband has not left behind enough property for the wife to live on, the court will not tell her to wait but, after a probe, the court will forthwith use its powers to grant her divorce or it will tell her to make divorce self-imposed. This Maliki ruling is followed by Shafi'i and Hanafi jurists as well, the reason being that, according to them, the absence of living expenses is in itself a sufficient ground for separation.
- i. If the husband has left behind property on which the woman can live, the court will look into the material details of the case, and if the woman is youthful and keeping her suspended for long can expose her to sin, the court will tell her to wait for some months or for a year, as it may deem fit. This stand is endorsed by the Hambali jurists as well. In extreme cases, the jurists of both Maliki and Hambali schools consider immediate separation also permissible. They also agree that to determine the exposure to sin, it is not necessary that the woman should declare bluntly that the retention of the marriage tie was sure to drive her into sin. It is for the court to take a probing look into the circumstances of the woman. Her age, her upbringing, her social environment and the period she has already spent in waiting, and other allied factors should guide the court to form its opinion as to how long she can wait without any danger to her morals.

iii. In case the missing husband has left behind living expenses, and there is no fear of the woman getting exposed to sin, the case can belong to anyone of the following clauses.

- a) If the man is missing in a Muslim country or in some other civilized country, where a search for him can be made, the woman will have to wait for four years.
- b) In case he was lost on the battlefield the woman will have to wait for a year, after every possible search has been made for him.
- c) If lost in a local riot or a fight, every possible search should be made for him, when the rioting ends. If no trace is found, the woman will immediately begin the appointed term of waiting that follows the death of husband.
- d) In case he has been lost in the wilderness where it is impossible to make a search for him, the woman will have to wait till such time when her husband was to reach the normal life expectancy. Normal life expectancy has been placed at 70, 75 and 80 years by different jurists. But as clarified above the wait can last only as long as the living expenses last and also only as long as the woman is not exposed to sin.

The trend among Hanafi jurists is to ignore these conditions and to give a ruling of four years' wait in all cases of this category. This is not right, especially in

the present age which has generated and spread a host of demoralising entertainments. To insist that every woman with a missing husband should wait for four years, runs counter to the objectives of the *Shari'ah*. Modern Muslim society has lost the cohesion of its early days. Restraints imposed by Islam to tame carnal lusts of the flesh have been swept away by the adoption of anti-Islamic customs and practices. Pornographic literature and pictures, vulgar film songs, obscene and disgusting T.V. programmes disguised as cultural shows, all of them exude, round the clock, torrents of lurid stuff shows. Originating from overcrowded, busy cities and towns these soul-killing currents rush, unobstructed to the remotest parts of the country, engulfing and demoralising everybody within reach. The law of the land permits prostitution. The veil, prescribed by the *Shari'ah*, is almost gone. The free intermixing of the sexes naturally excites passions. But it has become almost a routine and one finds it hard to lead a life of piety and restraint. In such a social setting, if a young woman whose husband is missing approaches the court after a wait of two or three years, how far will it be advisable to tell her to wait for another four years? This is a hardship, the evil consequences of which will not only afflict one individual woman but also infect the whole society. So the right thing is to adopt the Maliki ruling with all its stipulations. That will enable the court to take into account the age, the social environment and the waiting period she has already spent. The decision thus arrived at will be in keeping with the spirit of the *Shari'ah*.

14. RETURN OF THE MISSING HUSBAND

An important question relating to the issue is the return of the missing husband after the expiry of the

waiting period fixed by the court. Hazrat Omar's ruling on this point is that in case the man is back home before the woman has remarried he shall get his wife. But if she has already remarried another man the former husband shall have no right on her even if she might have had no intercourse with the second man. This ruling was upheld by Imam Malik and is followed by Maliki jurists.

Hazrat Ali's ruling is that a woman will remain the wife of the first husband even if she has already married another man and has borne children. Not only this, the second husband shall also have to pay dower to the woman, even if he has not had a single intercourse with her. Imam Abu Hanifah accepted this ruling. His argument is that Omar himself came round to Ali's view towards the end of his caliphate. However, Imam Malik asserts that no change in Omar's views on this point has been proved.

The ruling of Hazrat Usman is that on the return of the missing husband, the first husband should be asked whether he wants the wife or the dower. If he chooses to return the dower he paid, or if he gets the dower remitted (if it is yet to be paid), the second husband shall retain the wife. If the first husband insists on having the woman back, the woman will have to get a separation from the second husband and complete the period fixed for a divorced woman. Then she will be handed over to the first husband and will get dower from the second husband. There are some reports purporting to Hazrat Omar's approval of this course of action but Imam Malik rejects these reports as untrustworthy.

A careful look at the different points of view seems to suggest that the ruling of Hazrat Omar followed by Imam Malik is the best solution to the problem. The weighty argument in its favour is that no sensible man will care to marry a woman when there is the constant fear of her first husband coming back and taking her away, leaving his children motherless. In addition to this, he will have to pay the dower. The imposition of such conditions is sure to cause great harm to the woman. The ruling actually boils down to a lingering misery, which does not end even after the long period of waiting. The freedom of action won after spending the agonising period of waiting becomes erroneous if the threat of the sudden appearance of the first husband still hovers over the woman's head.

15. INVOKING ALLAH'S CURSE

If a husband accuses his wife of adultery or declares that her offsprings have not been sired by him, in both cases, he has to invoke Allah's curse on himself if the charge be false. A case of this nature was brought before the Holy Prophet (peace be on him). Addressing the two spouses, he repeated thrice:

"Allah knows full well that one of you is in the wrong. Will anyone of you come out with repentance?"

Both stood speechless. So acting on the Quranic mandate, he told the husband to declare on oath four times that the charge he had made against the woman was true. This done, he told him to invoke Allah's curse and wrath on himself if he be a liar. In a like manner the woman was made to declare on oath four

times that the charge against her was false. The fifth time she was made to invoke Allah's curse and wrath on herself if she had lied. At this the Holy Prophet observed: "This is the procedure to follow, till the Last Day, to separate a couple each one of whom invokes Allah's curse. There can never be a union between them after this separation." The husband submitted that the woman be told to return the dower she has received. The reply he got was: "You cannot get back the dower. If your accusation is true, the dower is the compensation for the good times you have spent with her. If the accusation be false, the right to get back the dower recedes still farther."

This precedent yields the following corollaries:

- i. The invoking of the curse should be in the court. The spouses cannot go through this legal requirement between themselves or in the presence of relatives. Nor can such a private function bring about separation.
- ii. Before calling upon the couple to invoke curses, the court will give them time to express repentance, if anyone of them chooses to do so. If both of them stick to their stands, Allah's curse shall have to be invoked.
- iii. After both spouses have solemnly gone through the act of invoking Allah's curse, the Qazi would declare that they stand separated. The popular view is that the act of invoking curses automatically brings about the separation. But Imam Abu Hanifah's opinion is that the verdict of the Qazi is

essential. All reliable reports reaching us from the Holy Prophet (peace be on him) support Abu Hanifah's view. In all such cases decided by him, the Messenger of Allah announced separation between the spouses after they had invoked curses upon themselves. This implies that he did not consider the invoking of curses just by itself sufficient to bring about separation.

- iv. The separation resulting from invoking of curses is everlasting and the man and woman cannot remarry. Even though the woman gets married to another man and is later divorced by him, she can never become lawful for the man who invoked a curse to prove his charge against her.
- v. Invoking of a curse does not affect the dower. It has to be paid irrespective of the truth or falsehood of the husband's charge. If it has been paid, the husband cannot get it back.

If a man withdraws a charge after bringing it against his wife, the popular view is that he should receive the punishment prescribed for slander. In the opinion of Abu Hanifah the man should not be scourged but receive a prison sentence. On the other hand if the woman, after invoking a curse, confesses her guilt, according to Imam Malik, Shafi'i and Hambal, she should be stoned to death. According to Imam Abu Hanifah she should be put in prison, which is more reasonable point of view. However, in the existing circumstances any of these punishments for a person going back on his solemn invoking of Allah's curse stand ruled out. For the time being the practicable

Shari'ah law for such cases should be as follows: If the man withdraws the charge, the woman should have the right to sue him for slander. If the woman confesses her guilt, she should be deprived of dower. This should continue as long as we are under a non-Muslim government and are unable to enforce the *Shari'ah*.

16. THREE SIMULTANEOUS DIVORCES

Separating a woman instantly by the simultaneous pronouncement of three divorces is a sinful act, on the basis of explicit Quranic mandates. There exists some difference of opinion among jurists as to whether the three simultaneous divorces amount to a single reversible divorce or to three irreversible divorces. But all agree that this act amounts to an innovation and is a sin. All declare that this mode of divorce runs contrary to the mode prescribed by Allah and His Messenger (peace be on him). This practice strikes at the root of the social welfare which the *Shari'ah* seeks to promote. According to a Hadith a man came to the Holy Prophet (peace be on him) and told him how he had pronounced three instantaneous divorces. The Prophet got upset, stood up in anger and said: "Is the Book of Allah, the Almighty, being made a plaything, while I am still among you?" Other reports make it clear that the Messenger of Allah declared the act a sin. It is reported of Hazrat Omar that if someone informed him that he had pronounced three instantaneous divorces, he scourged him with his whip. This is a proof that the act is not only sinful but also punishable.

In our times three instantaneous divorces, under the stress of an emotion, have become a widespread practice. As the emotion subsides, shame and regret

grip the guilty conscience of the man and a search starts for some excuse to undo what has been done. Someone takes cover behind false oaths to deny having divorced; another one arranges a spurious second marriage of the wife, followed by divorce and remarriage with himself. Still another one suppresses the report of his divorce and carries on conjugal relations with the wife as before. In this way the attempt to avoid the consequences of one sin leads to the commission of many more sins. To put an end to these evil practices, it seems necessary that effective restrictions be placed on the three simultaneous divorces so that people find themselves restrained from this hasty act. One way could be to give the woman, thus divorced, the right to claim damages amounting to at least 50 per cent of the dower. The Ulama and legal experts can also devise other preventive measures. In addition to this wide publicity needs to be given to the fact that three simultaneous divorces is a sin. This knowledge alone can deter a good many men from being hasty in the matter of divorce.

References

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1. This means that the woman becomes unlawful for her Muslim husband but the separation does not give her the right to marry another man.
 2. In his book *Mabsoot* Imam Sarkhasi has advanced only one argument in support of this ruling. He argues that Hazrat Ayesha was married to the Holy Prophet (peace be on him) when she was a minor. When she attained adulthood and came to the home of the Holy Prophet (peace be on him) he did not ask her whether she approved of the marriage tie or not. This question must have been asked if Ayesha had possessed the right to approve or disapprove. When the Quranic verse "*Takhyeer*" was revealed, she was asked to exercise her right and she did it.
One can say that despite all his frantic search, this incogent argument is all that Imam Sarkhasi has been able to cull from the Quran and the Hadith to

bolster his ruling. It is simply amazing that a scholar of his stature should treat so lightly an important issue affecting the lives of generations of women. He seeks to prove that Ayesha had forfeited her right to exercise consent because her father had given her in marriage, when she was a minor. On the face of it, this plea is not warranted by facts. It could have been valid if Ayesha, on attaining adulthood had disapproved of the marriage solemnized by her father, or at least if she had demanded her right to exercise approval and the right had been denied on the ground that she was married by her father when she was a minor. There is not the slightest hint from Ayesha throughout her life that she had been denied the right to exercise her consent. The mere fact that there is no hint anywhere that Ayesha was given the right to express her approval has been made the basis of the entire argument and the ruling has been given that no minor girl married by her father or grandfather has the right, on attaining majority, to exercise the option of retaining the marriage tie.

Sarkhasi overlooked his logical snag that if an event is not reported it does not mean that it did not take place. A still greater fallacy is the non-cognizance of the patent fact that on attaining adulthood Ayesha was not only pleased with but very proud of being the wife of the Messenger of Allah. Her approval of her father's choice was too evident to miss. So even if the formality of exercising the right of approval was not gone through, how can it be concluded that Aisha did not possess the right and so no other girl, who has been given in marriage by her father or grandfather, possesses the right to express approval or disapproval on attaining adulthood. Sarkhasi supports his strange logic by observing that in case Ayesha had possessed the right of expressing approval, the Holy Prophet (peace be on him) must have told her to exercise this right even without her asking for it, as he did when the "*Takhyeer*" verse was revealed. The fact is tacitly blinked that in the latter case, the Messenger of Allah carried out a definite Divine command, whereas he was under no such obligation in the former case.

The Ulema choose to follow such faulty reasoning for fear that whoso dares to reject it will be branded a non-conformist and an innovator.

3. This Hadith sheds very significant light on the true nature of dower. Gentlemen, those of you whose dower is fixed, according to the current practice, far above their means are requested to persuade their wives to reduce them to an amount easily payable right away, or in instalments. Pious wives are also advised to agree to the reduction. Every God-fearing Muslim should hasten to get rid of the excesses of dower as soon as possible. Dower is a debt. If it is not paid, whether deliberately or through neglect, and you pass away, the burden of debt remains on you. The Holy Prophet refused to offer funeral prayers for such a man.
4. Instead of the court using its power to separate the woman, it is preferable that the court should tell the woman to separate herself from him. The well-known case of Bareerah is the precedent. The Holy Prophet's reply to her was: You are the mistress of yourself. If you like, you may live with your husband, or if you like, you may separate yourself from him.

THE EPILOGUE

This book has explained in detail the legal objectives and principles of marriage in Islam. An effort has been made to solve, in the light of the teaching of the Quran and the Sunnah, the problems that cause trouble and frustration to the Indian Muslims. There is no pretension that the exposition of the Islamic law in these pages is perfectly correct, nor any insistence that the solutions suggested for various problems should be accepted as they are. No human opinion can be free from error and no one can claim his plan to be as perfect and acceptable as the word of Allah. The purpose behind the lengthy discussions in the foregoing pages was nothing beyond a clear exposition of the Islamic marital law, as propounded in the Holy Quran and the Sunnah. The corollaries drawn from these sources of law by the leading companions of the Prophet (peace be on him) and jurists have been examined and in their light, rulings have been deduced from them to serve the needs of the present times. It is now up to the people of learning and insight to take a look at our proposals with a broad vision and with the inspirational guidance from the Book and the Sunnah. Any errors, wherever they be, should be corrected. If any merit is found, it should not be ignored solely on the ground that the writer was born, by ill luck, in the 14th century A.H., instead of the 4th century A.H.

In the end, we want to make brief comments on some law bills prepared by some gentlemen from

Hyderabad (Deccan) and from British India.¹ From our point of view, all these bills are inadequate and fall short of our modern needs. They are too limited to eradicate the evils born of the faulty Anglo-Muhammadian law, the precedents set by non-Muslim courts over a century and of the existing judicial system. Even if it is laid down that some matters should be settled according to the Maliki School in place of the Hanafi School of Jurisprudence or for the solution of some problems even if the corollaries are briefly explained, it will afford little guidance to judicial officers who have no breadth of vision about the *Shari'ah* law and our schools of jurisprudence. Their minds are still in the grip of the spirit of the Muhammadan law. To set this chaotic situation right, it is particularly necessary that a comprehensive code of the Muslim marital law should be compiled. The point has already been hinted at. This is not an easy job. It needs the time and labour of many scholars. To accomplish the task a select group of scholars will have to put in collective efforts for quite some time. They cannot discharge this duty by quoting verbatim from the books of the ancients. As caretakers of the destiny of the Ummah, they are under obligation to come forth with an interpretation of the *Shari'ah* law, which not only realises the objections of the *Shari'ah* but also effectively protects the faith, the morals and the worldly interests of the Ummah.

References

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1. It is only the content of these law bills that is being taken into account. Whether these legislative bodies are competent to pass an Islamic law is under discussion. From the Islamic point of view, any law passed by these legislatures, even though in conformity with the *Shari'ah* to the letter, cannot be accepted as an Islamic law.

Appendix 1

A VERY IMPORTANT QUESTION

A very important printed question has been received from Delhi. The point at issue in the query has assumed all the importance because our leaders seem inclined to solve the issue in an un-Islamic way.

The question and the reply to it are given below:

Experts in Islamic learnings and the jurists of the *Shari'ah* law are requested to give well reasoned replies to the following questions in the light of the Quran, the Sunnah and Islamic jurisprudence.

- i. If a non-Muslim officer or a non-Muslim arbiter dissolves the marriage of Muslim spouses according to the Islamic law, or a non-Muslim officer or a non-Muslim arbiter in a case of the proved cruelty of the husband to the wife, divorces the woman on behalf of the husband just as a Muslim Qazi can do this in certain cases, will the marriage tie be dissolved and will the divorce take place? Will the woman get the right under Islamic law to look upon the dissolution of marriage and the separation made by a non-Muslim as legitimate divorce under Islamic law and marry a Muslim husband, on the expiry of the fixed period of waiting?

- ii. If the answer to the above question is in the negative, it means that according to the *Shari'ah* the dissolution of marriage and the pronouncement of divorce by the verdict of a non-Muslim, is void according to the *Shari'ah* and the woman remains tied to the marriage bond, with the first husband. In such a case if the woman marries another man and he knows that she got her divorced through a non-Muslim officer or a non-Muslim arbiter, will that marriage be void or not? And will it not be sinful for her, despite her marriage to the second man, to have conjugal relations with him? Will not the *Shari'ah* look upon both of them guilty of fornication?
- iii. In case the marriage with the second man be void will not the children born of this marriage be illegitimate? Will not these children be disentitled to be heirs to the property of this second husband?

ANSWERS

A fundamental error in this question is that it relates only to a non-Muslim officer or a non-Muslim arbiter. It should have related to a judicial system arbitrarily set up by man, entirely shutting out God. This is a system that bases its decisions on manmade laws. It should have been asked whether Divine law recognises this judicial system or not. Another error is that the question concerns only the dissolution of marriage and separation. Basically the nature of these issues is in no way different from any other issues. The decisions of non-Muslim court, in the eyes of the *Shari'ah*, about not only cases involving marital problems but

cases of all kinds are un-Islamic decisions. Islam does not recognize a government arrogating to itself absolute sovereignty, cut off from Allah, the Almighty, Who is the real Lord of the universe. Islam does not also recognize a law enacted by a human being or a group of human beings, entirely on their own. A court set up in a dominion of Allah Who is the true Lord and the Ruler, without His permission and by people who are in revolt against Him is not competent in the eyes of Islam, to hear and decide any cases. In the eyes of Islam the status of these courts is the same as the status of courts set up in the British Empire without the permission of the British Crown. The British law will look upon the judges and the functionaries of such courts as rebels. The lawyers appearing in these courts and the people bringing their cases to them will also be guilty of rebellion. In much the same way, Islamic law looks upon the entire judicial system existing in the country as criminal and rebellious, because it has been established without a charter from Allah Who is King of the earth and the heavens, and because it enforces a law enacted by someone else instead of Allah. Such a judicial system is an embodiment of sin whose judges, functionaries, lawyers are criminals; people bringing their cases to these courts are criminals. And all the decisions made by these courts are void. If any of their decisions in a case happens to be in keeping with the *Shari'ah*, it is still wrong because revolt lies at its root. Even if these courts cut off the hands of thieves, scourge adulterer or stone him to death, inflict Islamic punishment on the drunkards, in the eyes of the *Shari'ah*, these so-called Islamic decisions will not cleanse these criminals of their guilt. On the other hand, these courts will be declared guilty of cutting off hands and

other punishments without any authority. It is because they subjected the servants of Allah to powers that Allah's law had not conferred on them.

The nature of these courts remains unaltered, even if a so-called Muslim occupies the chair of the judge. Anyone who derives his judicial powers from a government in revolt against Allah, hears cases and enforces manmade laws, is not a Muslim, at least in his capacity as judge. He himself is a rebel. How can his decisions be immune from being nullified.

The same legal position remains unchanged even if the system of government is democratic and Muslims are associated with it, as a minority or a majority; the entire population may be Muslim and may have adopted a secular and democratic system of government. But any government based on the doctrine that its people are sovereign and possess the right to make laws for themselves, discarding the Laws of Allah, is, in the eyes of Islam, a rebel government. It is as good as a government set up by people in revolt against their king, since such a government can never be recognized as a legitimate government by the king, in the same way, a democratic government of this type can never be acceptable to Allah's Laws.

Views expressed above are fully supported by the Quran. In compliance with the demand of the correspondent, some of the Quranic verses are quoted below:

- i. According to the Quran all sovereignty belongs to Allah. He is the Lord of all creation. He alone has

the legitimate right to rule. It is fundamentally wrong for anyone, except Him, to have the right to rule in His dominions and enforce the mandates of someone else.

"Say: O Allah! Owner of Sovereignty, You give sovereignty to whom You please and You withdraw sovereignty from whom You please." (3: 26)

"Such is Allah, Your Lord; His is the sovereignty." (35: 13)

"He has no partner in the sovereignty." (17: 111)

"But the command belongs only to Allah, the Sublime, the Majestic." (40: 2)

"And He makes none to share in His government." (18: 26)

"Beware! His verily is all creation and commandment" (7: 54). "They ask: Do we have a part in the conduct of the matter? Tell them that the power to conduct an affair wholly belongs to Allah." (3: 154)

- ii. On the ground of the above stated principles man has been totally deprived of the power of law-making. Being a part of creation, man is only a servant and a subordinate worker. His main duty is to carry out the mandates issued by the Sovereign Lord.¹ If an individual or an institution, himself or itself, makes laws by ignoring Allah's Laws, or adopts some other manmade laws and enforces it, he is a rebel and an infidel. Anyone who seeks his

verdict and acts on it is also guilty of rebellion.

"And the things that you talk about, do not fabricate falsehood about them and say: This is lawful; this is unlawful." (16: 117)

"Follow that which has been sent down to you from your Lord and follow no false protecting friends beside Him." (7: 3)

"Whoso does not judge by the law that Allah has revealed: such are disbelievers." (5: 144)

"Have you not seen those, who claim that they believe in that which has been revealed to you and in what which was revealed before you. Then they go for judgement in their disputes to false deities, although they had been ordered to reject them." (4: 60)

The right form of government and the right judicial system for mankind can only be the one which is based on the law revealed through the prophets. This is the Khilafat, the Kingdom of God.

"And each messenger that We sent, was sent that he should be obeyed in obedience to Allah's Commandment." (4: 64)

"Lo! We have revealed to you the Scripture with the truth that you may judge between mankind by the light that Allah has shown you." (4: 105)

"So judge between them by the light Allah has revealed, and do not follow their desires. And beware

of them lest they lead you astray from some part of what Allah has revealed..... Is it a judgement of the times of pagan ignorance that they are seeking?" (5: 49, 50)

"O David! We have made you a viceroy in the earth. Therefore, judge aright between mankind and do not follow base desire, lest it should beguile you from the way of Allah." (38: 26)

Any government and all courts which rest on a law other than the one revealed by Allah, through His prophets, are seditious, despite differences in their nature. All their acts are baseless and spurious and their commands and decisions are without a legitimate ground. How can they claim to be legitimate governments or legitimate courts without being granted a charter by the true Sovereign Lord?² In the eyes of Allah's Law, all their acts and verdicts are void. Faithful believers in Allah can accept their *de facto* existence, but cannot accept them as *de jure* means of administration. They should in no way obey the rebels of their true Lord and have their affairs settled by them. Those of them who do so, are outside the fold of believers despite all their claims to Islam and the faith. It is simply irrational that a government should declare a group of people as rebels and then also recognise the jurisdiction of these rebels over its subjects and order them to carry out the rebels' commands.

"Say: Shall We inform you who will be the greatest losers with regard to their deeds? It is the ones whose efforts went utterly waste (because all their efforts related to this world) and they consider that they are

doing good. They are the people who disbelieve in the revelation of their Lord and in the meeting with Him. So all their achievement have become void and shall carry no weight on the Day of Resurrection." (18: 104, 105)

"And such were Aad; They refused to obey the mandates of their Lord, disobeyed His Messenger and followed the command of every stubborn tyrant." (11: 59)

"And verily We sent Moses with Our Revelation and a lucidly clear warrant to Pharaoh and his chiefs. But they followed the commands of Pharaoh, although Pharaoh's command was no right guidance." (11: 96, 97)

"And do not obey him whose heart We have made heedless of Our remembrance, who follows his own lust and who is lost to all sense of truth." (18: 28)

"Say: My Lord forbids only indecencies, such of them as are apparent and such as are hidden within, and sin and wrongful oppression, and that you associate with Allah those (deities or rulers) for which Allah has revealed no authority." (7: 33)

"Those whom you worship beside Him are only names which you have named, you and your fathers. Allah has revealed no sanction for them. All authority belongs to Allah alone. He has commanded you that you worship none except Him." (12: 40)

"And whoso disputes with the Messenger after the guidance of Allah has been made clear to him and fol-

lows other than the believers' way, We push him on to the path to which he himself has turned, and hurl him into Hell, a hapless journey's end." (4: 115)

"But nay, by your Lord, they will not believe in truth until they make you judge of what is in dispute between them." (4: 65)

"And when it is said to them: Come to that which Allah has revealed to the Messenger, you see the hypocrites turn away from you in aversion." (4: 61)

"And Allah will not give the disbelievers any way of success against the believers." (4: 141)

These are self-explanatory verses of the Holy Quran, free from any ambiguity. If the central article of faith on which the moral and cultural structure of Islam has been raised, had any ambiguity in it, the very revelation of the Quran would have been without any purpose. That is why it has been so explicitly and definitely stated that no room is left for forming two opinions about it. This lucid exposition eliminates the need for turning to Hadith or Islamic jurisprudence.

The entire edifice of Islam rests on the rock foundation that a thing for which Allah has revealed no sanction is groundless and anything that has been established without caring for Allah's sanction is void according to the *Shari'ah*. So there is no need to question as to whether or not the decisions of secular courts on a particular matter are enforceable according to the *Shari'ah*. If a child is born illegitimate, it is pointless to ask if its hair are also illegitimate. Since the pig is un-

lawful, every bit of its flesh is unlawful. It amounts to ignorance of Islam to ask if the decree of secular courts on matters like the dissolution of marriage, separation of spouses, declaring a divorce, are enforceable or not. The ignorance is all the more serious when the question is about non-Muslim judges. It implies that the decision would have been enforceable if the secular courts had been headed by the so-called Muslim judges in place of non-Muslims. Pork cannot become lawful by labelling it mutton.

The acceptance of this fundamental doctrine of Islam certainly makes the lives of Muslims living in a secular state very hard. But you cannot modify the basic doctrine of Islam to make the lives of Muslims easy. If Muslims want to enjoy the ease of living in secular states, it is up to them. But they have no right to alter the fundamentals of Islam or changing Islam into something else. The opportunity of apostasy is there; nothing can stop one from it. It is easy to give up Islam and adopt some easier way of life. But if they mean to stay within the pale of Islam, the right Islamic way for them is not to seek excuses for amending the fundamentals of Islam so that they can live in ease in a secular state. There is just one way open to them: wherever they may be, they must strive with all their might to change the views of the state and to reform the principles of government.

Tarjiman-ul-Quran
August, 1940.

References

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1. Deducing judicial details from Allah's mandates, adhering strictly to the spirit of the law, is a different matter. It is not under discussion here. Moreover, believers have the right to formulate laws or matters on which there exists no mandate in the Quran and the Sunnah. But this task has to be accomplished strictly in keeping with the spirit of Islam and the Islamic law. The fact that there exists no Quranic mandate for the solution of a problem grants the believers the authority to draw up the necessary rulings.
 2. Where there is a government which believes in Allah to be the Sovereign Lord; looks upon itself as His viceroy (not independent), believers in the Holy Prophet and the Quran and agrees to function in accordance with the *Shari'ah*, such a government or such a court shall be regarded as the holder of charter from the Lord of the worlds. This character is there in the Quran: Judge between them by the law revealed by Allah.

Appendix 2

DIVORCE AND SEPARATION LAWS IN THE WEST

"Things are distinguished through their opposite," is a popular saying. The foregoing pages have given details of the Islamic marital law. However, the beauty of this law cannot be fully appreciated without a comparative study of other marital laws of the world, which claim to be progressive. The study will also show what blunders are made by man when he ignores Allah's guidance and becomes his own law-maker.

An important characteristic of the Islamic law is its extreme concern for moderation and balance in its principles and basic mandates. On the one hand it is guided by a lofty moral ideal, and on the other it makes due allowance for human weaknesses. On the one hand it seeks to promote the cultural and national welfare, on the other, it protects the rights of the individual. It keeps its gaze fixed on factual positions but does not lose sight of possibilities that might develop any time into realities. In fine, it is such a moderate law that does not allow any of its principles and mandates to over do or to fall short. Islam gives full consideration to all the necessary aspects of law-making, theoretically as well as practically. The balance between its various aspects is so accurate that no undue leaning toward one side or an unjust neglect of the other side can be cited. That explains the secret of its success over a span of fourteen centuries, in different times, in different cultural environments and with peoples of dif-

ferent intellectual levels and varied temperaments. No individual or collective experiment has found any of its basic mandates wrong or needing an amendment. Not only this. The human mind, despite all its efforts, has been unable to suggest for this law a substitute which, in moderation and balance, could even partially match it.

This quality of the Islamic law can only be the product of Divine wisdom and insight. Because of his inevitable handicap and natural limitations, man can never have the power to encompass all aspects of a problem or take an equally searching look both at the present and the future. Nor can he simultaneously take a look at the actual and potential or make a probe into the apparent and the hidden traits of his own self, or of mankind. He cannot fully rise above the influence of his environments, his passions, his physical aptitudes, his mental handicaps and scholastic shortcomings. So, he is incapable of making a rule which can hold good with all fairness and balance, in all circumstances, at all times and for all needs. That is why all manmade laws lack balance; the theoretical aspect may get over-emphasis, or the various aspects of human nature may not get due attention. The rights and duties of individuals may not be justly specified or the rights and limitations of the individual and society may be unjustly demarcated. The failings of manmade laws get exposed in every new experiment, with the changing circumstances and changing times. This forces man either to amend the laws or to pay lip service to them but discard them in practice.

This basic difference between Divine law and man-made law is today too glaring to miss, except by the blind or the myopic. Some principles of Islamic law

which were under bitter attack till recently because of prejudice and ignorance, and some theories and rules of manmade laws were extolled to counter the Islamic principle, the testimony of actual facts proves irrefutably today that Islam's verdict is infallible. As against this all manmade laws turned out to be wrong and impracticable. In the imaginary world they dazzled the eye, and even today they are not openly disowned, but in practice, people are violating these laws, which till recently were looked upon as sacrosanct and beyond amendment. The world is slowly swinging towards the principles and rules prescribed by Islam, but only after a very bitter experience.

Take, for example, the problem of divorce. Till very recently the Christian world has heaped ridicule on Muslims on this issue. Several of the awe-stricken Muslims had failed to provide any answer. However, facts have proved that it was not wise on the part of Christianity to make the sacred tie of marriage unbreakable, and make no provision in the law for divorce, *khula*, dissolution of marriage and separation. This error was the product of immoderation of the human mind. Instead of promoting morality, humanness and social welfare, the Christian marital law started breeding forces of disruption.

"Let man not pull apart those whom God has joined." (Mathew 6: 19)

The Christian world misinterpreted this sage advice of Christ. In place of making it a basis of moral guidance, it was made the basic principle of the marital law. And what was the outcome? For centuries the

Christian world clung to this impracticable law, violating it under various pretexts and tricks. Ultimately the evil habit of law-breaking grew so strong that the moral scruples that were more sacred than the marriage bond began to be violated openly and quite frequently. At last people felt compelled to make some faulty amendments in the law which had been mistaken for a Divine law. But by the time this reform was made, the habit of law-breaking had taken such firm roots in the Christian mind that it had lost all respect for things enjoined by God. Consequently, the faulty amendments in the marital law triggered off a spate of divorces, dissolutions and separations in the Christian world. And such was its intensity that the sacred institution of the family has been threatened. In England there were just 166 separations in 1871. In 1933 the number soared above four thousand. It meant that out of every 79 couples united by God, one had been separated by man. In the U.S.A. there were 35 thousand separations in 1886. In 1931 the number of sacred ties torn asunder has risen to over 183 thousand. Almost the same situation prevails in other Western countries.

The advice given by Christ has a parallel in the Quran too:

"Those who break the covenant of Allah after ratifying it, and tear apart what Allah ordered to be joined, and who make mischief in the earth, they are the ones who are losers." (2: 27)

To warn the Jews against their hard-heartedness and their frequent resort to divorce, Jesus had to declare:

Whoso divorces his wife for any reason other than adultery, and marries another wife, commits adultery. (Mathew 9: 19)

For the same reason, the Holy Prophet (peace be on him) declared divorce to be the most hateful of the permissible things. He also warned that the curse of Allah falls on the man who divorces only for the gratification of his lust.

However, these lofty moral ideals were meant only for men aspiring to moral heights; they were not meant to be transformed in a law. The Holy Prophet (peace be on him) was not only a teacher of morality but also a law-giver. So he enunciated moral laws and also explained the extent to which they should influence law, so that balance may be maintained between morality and human nature. On the contrary, Jesus was not a law-giver. His mission in this world ended before he could enforce any law. So we find nothing in his sayings except the basic moral precepts. If these precepts were to be applied to practical problems of life, it could only be done in the light of the Mosaic law. But the Christians came to think or were led to think by St: Paul that the moral teachings of Jesus nullified the Mosaic law and the law-making was the business of the Church and not the business of God and His Messenger.

This was the colossal error that drove the Church and its followers into perpetual abyss. The two-thousand year history of Christianity bears witness to the fact that the Church never succeeded in making even a single sound law on the basis of the fundamen-

tal principles of the faith enunciated by Jesus. At last Christian nations were forced to abandon these principles.

In his denouncement of divorce, Jesus had made adultery a justifiable reason for it. This exception was a hint that divorce was not an absolutely evil thing. It was an evil in the absence of a legitimate cause. The Christians did not take the hint and some of them even came to look upon the exception as a later addition. Their argument was that the exception contradicted the warning of Jesus: Let man not pull apart those whom Allah has joined. Some even deduced from this warning the fantastic conclusion that in the event of the wife's unfaithfulness, the spouses should be separated but the marriage tie should stay i.e. neither one of them should be free to have a second marriage. For centuries Christians remained bound by this law. This law along with other laws was responsible for the spread of immorality in the Christian world.

Advanced countries of the West now base their laws on rational principles, quite free from the influence of the Church. Interestingly, even in England and the United States, judicial separation means that the spouses should part company but should not be free to have a second marriage. Such is the manifestation of the failings of the human mind! The canon laws of the Roman Catholic Church were framed on the basis of the aforesaid principle. They totally ruled out divorce or the dissolution of marriage which could enable the spouses to remarry. However, six reasons for separation were proposed:

THE RIGHTS AND DUTIES OF SPOUSES

1. Adultery or Homosexuality.
2. Impotency
3. Cruel treatment
4. Disbelief
5. Apostasy
6. Detection of some extra-legal blood relationship between spouses.

The legal remedy suggested in all these cases was that the spouses part company and live as celibates. No sane man can look upon this as a sensible remedy. Actually this was not a remedy but a punishment that deterred most of the people from taking separation cases to the court. If some unfortunate couple was separated, the spouses had either to spend their lives as monks and nuns or to submit to a life of sin.

To avoid this harsh and impracticable law the Christian clergy invented several legal tricks with which the church dissolved the marriage of miserable spouses. One of the tricks used was that the life-long promise of union made at the time of marriage should be declared to have been made unintentionally. The real intention was stated to be companionship only for a part of life. Under the cover of this excuse, thus the marriage was annulled. That meant that their marriage never took place, their conjugal relationship thus far had been unlawful and their children were illegitimate. So the remedy was more humiliating than the malady.

Compared to the Roman Catholic Church, the law made by the Orthodox Eastern Church, which had had more opportunities of contact with the Islamic Law, is

a better and more practicable law. According to it the marriage tie can be dissolved on the following grounds:

1. Adultery.
2. Apostasy.
3. Dedication of life by the husband as monk.
4. Rebellion.
5. Desertion.
6. Impotency.
7. Madness.
8. Leprosy.
9. Long imprisonment.
10. Intense mutual hatred or incompatibility.

But this law is unacceptable to the Western countries. They believe in the rulings of the Roman Catholic Church, which categorically declares that nothing but death can break the marriage tie. This ruling leaves no room for independent thinking or even taking a critical look at another Christian school of thought. Speaking to the Royal Commission in 1912, Bishop Gore opposed the borrowing of some rulings from the Orthodox Eastern Church on the ground that the Anglican Church was a follower of the Roman Catholic jurisprudence. In the Lambeth Conference of 1930 it was unequivocally declared that the marriage of a man or a woman whose former spouse was still alive, could not be solemnized. The last reform that was accepted by joint committee of Convocation in 1935 was that a marriage could be dissolved if one of the spouses had been suffering from a venereal disease before marriage, or if the woman was pregnant at the time of marriage but concealed this from the husband. This implies that in case of any such contingency aris-

ing after marriage there is no way out for either one of the spouses.

This was the chaotic picture of the marital law of the followers of the faith which has given the world a long chain of scholars and jurists. However, its earliest leaders misinterpreted the meaning and legal implication of a saying of Jesus Christ. That fact left an indelible mark on the Christian faith and its jurisprudence. The march of centuries, changes in environments, the intellectual and mental evolution, the studies of human nature, centuries of experience, the clear verdicts of reason, the records of better legal systems, and, in short, the cumulative effect of all these factors has failed to erase the indelible mark on the Christian faith. Despite all their efforts spread over a millennium, the best minds of the Roman Catholic Church have not been able to give their law the right balance and moderation.

Now let us take a look at the achievements of the enlightened Western law-makers of vast learning and experience, who, unfettered by religious restraints, have framed laws for their people.

Before the French Revolution most of the European countries were in the grip of the law made by Roman Catholic Church. This law, combined with other laws of similar nature, had given birth to a host of moral and social evils. During the revolutionary period, free thought and free criticism gained momentum. Their first target was the sorry state of the law. Feeling that the clergy could, in no way, be persuaded to accept reform, people threw off the yoke of the

Church. This took place in France in 1792. By and by the movement spread to other countries. England, Germany, Austria, Belgium, Holland, Sweden, Denmark, Switzerland, all turned their back on Church laws and framed their own marital laws. These laws provided for legal separation and dissolution of marriage and also for divorce.

This widespread revolt of Christian nations against the canon law was the direct result of the narrow-mindedness, ignorance and prejudice of the clergy. They insisted on oppressing the people, with their religious authority and impracticable, unnatural and harmful laws. The law was not Divine. It was the product of the independent judgement of the clergy. But the priests declared it sacrosanct and beyond amendment as though it were God-made. They simply refused to see or comprehend its glaring errors, harms and irrational aspects because they were scared of forfeiting their faith, even by a shadow of the possibility of ascribing error to the rulings of St. Paul and other giant figures of early Christianity. They were opposed even to borrowing useful elements from the jurisprudence of another Christian sect. The reason for this was not the superiority of their own law, but the fact that they were the followers of the Western Christianity. This unreasonable attitude of the clergy left no option for the Western nations except to break away from the canon law which was considered above reform, despite its apparent errors and harmfulness.

This mentality of the clergy is not just limited to the marital law. The truth is that it is this mentality that has driven European nations to atheism, secularism and hedonism.

Having got rid of the canon law, marital laws formulated by the Western countries over a century were the fruit of the best efforts of hundreds and thousands of minds. Again and again amendments have been made in these laws in the light of experience. In spite of all this, their law lacks the balance and moderation of the law gifted to the world by the unschooled Prophet of Arabia (peace be on him). The strange thing is that even after doing away with the canon law, the people of the West have not been able to erase from their minds the concepts inherited from the early founders of the Roman Catholic Church.

Let us take the example of England. Before 1857, adultery and cruelty were the only two grounds on which legal separation could be made. Divorce, freeing the spouses to remarry, was forbidden. In 1857, desertion or suspension of conjugal relations was also made a ground for separation provided the desertion lasted two years or more. This law also legalized divorce, freeing the spouses to remarry. But the husband could not use the right of divorce on his own. He had to use it through the court. In the same way if the woman wanted divorce, she too had to have recourse to the court. But there was just one way of getting a decree of divorce. If the husband wanted to divorce, he had to prove the unfaithfulness of the wife. In case the wife wanted separation, she had to prove the man's unfaithfulness and cruelty or desertion. This provision of law forced men and women desiring to get a divorce, to accuse the other spouse of unfaithfulness, no matter what the actual motives were. Proving allegations in the court, easily led to fabrications of charges and the undeserved defamation of innocent people. The court-

became the centre for washing dirty linen. The press reports of divorce cases amounted to the publicity of obscenity. The law permitted husbands, if they so wanted to receive damages from the paramours of their wives. Such damages, of course, amounted to the price for illicit relations with the wife.

In 1896 the court was given the power to make the erring husband pay his divorced wife alimony. In 1907 the court was given unconditional power to make a husband liable for alimony to the divorced woman, if it thought fit. Of course, this amounts to partiality toward women. It upsets the balance of the law. In the absence of any existing relationship, it is clearly unfair to burden a man with the living expenses of a woman on the basis of a previous relationship.

The law of 1895 declared that in case of a woman leaving her husband because of his cruelty and taking up separate residence, the court would debar the husband from visiting her. She would be entitled to alimony and to keep her children with her. The law also said that in case the cruelty and the negligence of a husband drove a woman into illicit relations, the man's plea against her for a divorce would not be admissible. The implications of the law are ridiculous. It boils down to this: A woman proves the cruelty of her husband, takes up separate residence along with her children, is free to receive paramours, and the husband is debarred from visiting her. All the same the poor man has to pay alimony of this merry-making wife and has no way of getting rid of her. This was the law framed by some of the best minds of England after half a century of labour.

A Royal commission was set up in 1910 to deliberate on the marital relations. The commission submitted its report at the end of 1912, after three years of deliberations. Some of its recommendations were:

1. The husband and the wife should be at par regarding the grounds for divorce. The grounds on which a man can be granted divorce should also be the ground for the woman to get a divorce. For example, adultery, even if committed just once by either one of them, should lead to a divorce.

The following were added to the previous grounds for divorce:

2. Desertion for three years. Ill-treatment. Incurable madness for five years. Hopeless drunkenness, punishment resulting from the commutation of the death sentence.
3. On the ground of drunkenness the spouses should be separated for three years. If the addiction still persisted, the aggrieved spouses should be entitled to a decree for divorce.
4. If one of the spouses is afflicted with madness or a venereal disease and the fact has been hidden from the other spouse or the woman is pregnant and has hidden the fact, it should be considered a sufficient ground for the dissolution of marriage.
5. Reports of divorce cases could not be published during their proceedings. Later the court may per-

mit publication of only those parts of the proceedings which it deems fit.

Out of these proposals only the first one, which is most irrelevant and uncalled for, was accepted and published in the *Matrimonial Cases Act*, 1923, and the rest have never been given legal shape or sanction simply because they did not find favour with the chief priest of the Canterbury and some other influential figures there. The bankruptcy of the mental faculties of the best brains of England can well be imagined from the fact that they were just unable to understand and distinguish the legal and natural aspects of adultery. The faulty system of law-making led to the manifold increase in cases of divorce claims from women which disturbingly alarmed the courts of England. As a result, Lord Merziville had to take strong preventive measures in 1928.

In European countries where the Roman Catholic Church is quite influential, the marriage bond is still considered unbreakable with the exception of only a few cases where the separation can take effect after legal proceedings but with the condition that the spouses will neither be able to reunite or have second marriages. The laws of Italy and Ireland are made according to this system. France has also passed through many ups and downs with regard to the marriage laws. The divorce has been made extremely easy and simple after the French Revolution. A few restrictions were promulgated under the Code of Napoleon which were totally banned in 1816 only to be restored in 1884. But several laws were enacted in 1886, 1907 and 1924 according to which following conditions were laid for granting divorce:

They were, adultery or fornication by any of the spouses, cruel behaviour, any objectionable act on the part of any one of the spouses which reflected on the honour of the other, refusal by any one of the spouses to fulfill the marriage rights, drunkenness and punishment by the court which caused dishonour.

Besides, the court-effected divorced woman was also liable for 300-day *iddat*, waiting period, which was fake imitation of the Islamic ruling on the subject. The laws of divorce in other European countries are not in consonance with one another either. The only common factor among them are that they are faulty and imbalanced. The spouses in Austria, Belgium, Switzerland and Norway can secure divorce only after mutual consent and agreement. And this type of divorce is the faulty model of the Islamic way of divorce from woman, i.e., *khula*. In Germany, the separation of the spouses, or living apart without any reason, does not amount to invoking divorce as long as this separation continues for a year. This kind of separation is a faint reflection of *Eila* or leaving alone for a specified period. The waiting period for separation in Switzerland is three years and five years in Holland, while the marriage laws of other European countries are silent on this subject.

Sweden has fixed six years waiting period for the missing husband, and ten years in Holland, while other countries are still silent on this topic too. On madness of the husband, Germany, Sweden and Switzerland have granted three years each but other countries have given no legal ruling on this subject. While Belgium has granted ten months as waiting period for the

divorced woman, and apart from France and Belgium, no other country has fixed any waiting period for second marriage for the woman.

In Austria, five years of imprisonment of any one of the spouses is enough for claiming the divorce. But in Belgium the condition is life imprisonment for such a claim.

Such are the laws and rules of marriage and divorce among those nations of the world which are considered most civilized. A cursory glance at these legal systems indicate that none of these countries has been successful in devising complete but balance and moderate legal system regarding the marriage bond. On the contrary, whoever looks dispassionately and honestly at the Islamic laws of marriage and divorce he would agree and endorse the fact that the Islamic laws have reached the pinnacle of uprightness, total balance, have consideration of man's nature, uphold safety of social system and acquire full control of the regulations of the various issues and problems relating to marital life. As against this, the laws of the Western countries, individually or collectively, come nowhere near the Islamic laws. Interestingly, the laws of the European countries were devised by the best of the brains of those countries in the nineteenth century, whereas the Islamic laws were formulated and devised by an unlettered and simple man, the Prophet (peace be upon him), who never consulted any parliament, legislature, law-making body, any commission or body of experts or legal luminaries for formulating or promulgating them. And if anybody, despite this prominent difference, challenges and dares to say that

the Islamic laws are not made by God but purely man-made, we would opine that such a person should have proclaimed godhead for himself. But there can be no clearer proof of truthfulness of the Prophet than that he never took credit for the noble and miraculous achievement which is beyond even man's comprehension. Rather he declared openly and repeatedly that he did not invent or present anything of his own; whatever he has presented to the world was given to him by God through Divine revelation. If a man continues to deny the necessity of Divine guidance and insists on being his own leader and torchbearer, stupidity is the most suitable term fitting him.